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PRODUCT TESTING STANDARDS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON GENERAL OVERSIGHT AND THE ECONOMY

OF THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

WASHINGTON, DC, SEPTEMBER 20, 1984

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PRODUCT TESTING STANDARDS

THURSDAY, SEPTEMBER 20, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GENERAL OVERSIGHT AND THE ECONOMY,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 2359-A, Rayburn House Office Building, Hon. Berkley Bedell (chairman of the subcommittee) presiding.

OPENING STATEMENT OF CHAIRMAN BEDELL

Mr. BEDELL. The subcommittee will come to order.

Today the oversight subcommittee will explore an issue that is of great importance to consumers and small businesses in America. When we look at product testing approval practices, what we are really investigating is the manner in which new innovative and cost-saving products are approved for sale in the marketplace.

Product standards are very much a factor in our society. When properly applied, standards perform a valuable role to inform consumers and protect our health and safety. However, when improperly applied, product standards can pose competitive and consumer problems.

Standards are often set with a great deal of input from established industry members. Over the years, this committee has been made aware of instances where small firms have been shut out of this standard-setting process and have been denied the opportunity to demonstrate the performance capabilities of their products. This is very disturbing because it prohibits potential competitors from entering the marketplace. When firms are denied access to standard-setting and testing processes, the system no longer serves to protect consumers; instead, it protects a select group of manufacturers from competition.

In 1982, the U.S. Supreme Court spoke to the power of these standard setters. In the case of the *American Society of Mechanical Engineers* v. *Hydrolevel,* the Court said:

> ASME wields great power in the economy. Its codes and standards influence the policies of numerous States and cities and, as has been said about "so-called voluntary standards," generally its interpretation of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout our country," as well as entire segments of an industry.

Today's hearing will serve as an initial step for further subcommittee activities in this important area. Our main concern is to assure that small firms with new products have the same access to product testing procedures that their larger competitors enjoy. This

subcommittee wants to assure that competent manufacturers have the chance to prove the utility of their products.

We are fortunate this morning to have witnesses with firsthand experience in product testing practices. I have been anxiously awaiting this hearing for some time and look forward to the testimony we will receive.

[The opening statement of Congressman Conte follows:]

OPENING STATEMENT OF HON. SILVIO O. CONTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, thank you for calling this hearing on the impact of independent testing labs on small business. This issue has become increasingly important over the past few years, and I am happy we have this opportunity to examine the situation.

I do not think I need to explain to this audience how small business is often on the leading edge of innovation in our society. Several studies have shown that small business is responsible for more than half of all major U.S. inventions.

The situation with testing labs is a major factor in helping—or hurting—small business as they try to get their products to the marketplace. Today we will hear from two small businesses who apparently have been hurt by the certification process. We will also hear from Federal agencies with responsibility in the area.

I am certain the witnesses today will provide a valuable insight on this issue. I am looking forward to the chance to question them.

Finally, I would like to take one moment to express by gratitude to Chairman Bedell. He and I have served for two years together on this subcommittee and for 4 years on the Energy Subcommittee. His dedication to small business issues is remarkable. It is a pleasure to serve with you, Mr. Chairman and I am looking forward to many more years of service with you.

Mr. BEDELL. Mr. Sisisky, do you have a statement?

Mr. SISISKY. Mr. Chairman, I have no statement. But I just want to reiterate your last paragraph. "Our main concern is to assure that small firms with new products have the same access to product testing procedures that their larger competitors enjoy."

I am anxious to hear the testimony from both sides of the issue to see if, perhaps, we can solve the problem.

Thank you.

Mr. BEDELL. Thank you very much.

Mr. Schaefer.

Mr. SCHAEFER. No, I don't, Mr. Chairman, thank you.

Mr. BEDELL. Thank you.

We will, therefore, proceed with our first panel. Panel 1 consists of Mr. Richard Alexandres, president of Alexander Manufacturing Co. of Mason City, IA; Mr. Edward J. Martin, Nu Fire Products, of Norwood, MA; and Mr. Leonard Frier, president of MET Electrical Testing Co. in Baltimore, MD.

Would the three of you, please, come forward? And if you have anybody you want to come with you, it will be permissible.

Thank you. We will first hear from Mr. Alexandres, unless your wishes are different on the panel, and then Mr. Martin, and then Mr. Frier. Mr. Alexandres.

TESTIMONY OF RICHARD ALEXANDRES, PRESIDENT, ALEXANDER MANUFACTURING CO.

Mr. ALEXANDRES. Good morning, Chairman Bedell. My name is Richard Alexandres. I am president and owner of Alexander Manufacturing Co., and we are located in Mason City, IA.

Mr. Chairman, before I begin my testimony, I would like to take this opportunity to thank you for your efforts on behalf of small businessmen and women in Iowa and around the Nation, and particularly for scheduling this hearing on the impact of product testing approval policies on small business.

Alexander Manufacturing Co. produces and markets small communication batteries, both primary and secondary, along with the allied charging equipment and testing equipment for commercial use.

In 1976, we expanded our line to include intrinsically safe replacement batteries for portable communications equipment. An intrinsically safe battery is one which is used in areas where the production of any type of spark would cause an explosion. For example, these batteries are particularly useful in mines and the petroleum industry where highly inflammable methane gas and other type gases are present. We believe the annual market for intrinsically safe batteries to be over $20 million per year.

For the past 8 years, we have attempted to secure an intrinsically safe rating for one battery and have been unable to do so. While our product has met the standards for evaluating intrinsic safety employed by both private and public sector testing laboratories, we have been unable to get the two major testing organizations, Factory Mutual or the Mine Safety and Health Administration, to even test our product.

Their unwillingness to test Alexander's intrinsically safe batteries has effectively prevented us from marketing our product, which is less expensive, and we believe a superior product, than the batteries currently on the market.

In late 1976, we approached Factory Mutual Research, Inc., and asked them to test our batteries for intrinsic safety. Factory Mutual informed us that under the guidelines outlined by the National Fire Protection Association for evaluating intrinsic safety, they could not test our batteries as a separate entity. These guidelines require that intrinsic safety be treated as a system concept, meaning the battery must be tested in connection with the equipment in which it will be used.

Our batteries are specifically designed to be used in communication equipment manufactured by Motorola Communications and Electronics Corp.

Motorola produces both communications equipment and the batteries necessary to power such equipment. Motorola has intrinsically safe ratings for both the equipment and its own batteries. Because Motorola manufactures both products, they had no difficulty meeting the system requirements.

In order to conduct intrinsic safety tests on our replacement batteries, Factory Mutual requires that we obtain a letter from Motorola authorizing Factory Mutual to use information from Motorola's files to evaluate our product. Furthermore, Motorola would have to agree to include a statement on their radios identifying our batteries as alternatives to the presently approved battery packs, which are manufactured by Motorola.

Factory Mutual refused to test our product unless we could obtain full cooperation from the radio manufacturer.

We requested that Motorola cooperate with us and allow us to use their communications equipment to test our batteries. To date, they have not given us an answer. Intrinsically safe batteries sell for about $100 in the United States and about $250 in Canada. If Alexander receives Factory Mutual approval, we would be competing for the lucrative business of selling replacement batteries, both domestic and overseas.

Motorola is currently the primary supplier for replacement batteries for Motorola portable communications systems. As a result of the nature of the standards for evaluating intrinsic safety, Motorola is able, if it chooses, to completely exclude competitors from entering into the marketplace without their permission.

In our attempts to have batteries tested, we also approached the Labor Department's Mine Safety and Health Administration's Approval and Certification Center. They also refused to test the battery pack alone, stating that the approval holder, in this case Motorola, would have to request that its approval be extended to our batteries—replacement would have to be officially accepted as part of an approved piece of equipment before they could be used in mines.

In 1980, the Canadian Standards Association tested one of our battery packs and found it to be intrinsically safe when used with Motorola transreceiver types HT220 and MT500. We advised Factory Mutual and the Mine Safety and Health Administration of the Canadian certification.

However, we have still not been able to obtain an intrinsically safe rating in the United States until MET, Inc., approved our batteries recently.

The issue that we at Alexander Manufacturing have confronted for nearly eight years is that standards-setting organizations and testing labs are able to control who may participate in the marketplace by imposing unreasonable standards and requirements on would-be competitors.

Alexander Manufacturing is trapped in a catch-22 situation. We cannot compete in the market for replacement batteries without first obtaining the full cooperation of our potential chief competitor.

MET Electrical Testing Co., Inc., a small for-profit testing lab in Baltimore, tested our batteries as stand-alone devices to be used in conjunction with the Motorola MX 300 series FM two-way radios. MET concluded that our battery is in compliance with the appropriate regulations for use in a class 1, division 1, groups C and D methane atmosphere.

The U.S. Coast Guard has approved MET's testing procedures for qualifying our product for use on U.S. merchant vessels. However, without Factory Mutual and Mine Safety Administration approval, our product is still not marketable in most industries.

Factory Mutual is generally recognized in many industries as the authority for determining intrinsically safe. Without their approval we cannot market our batteries in certain industries. This has been a particular problem when we have attempted to market our batteries to petroleum companies. For instance, a representative of Amoco Oil Co. informed us that all communications batteries must have Factory Mutual approval.

Similarly, Exxon Corp. will not purchase batteries unless they are approved by the appropriate regulation agency, meaning FM. In the petroleum industry, Factory Mutual is recognized as the authority. So without their approval, Exxon will not consider purchasing our products.

Motorola has made this situation worse. They have engaged in a sales campaign wherein they assert that if replacement batteries are not approved by Factory Mutual and are used in their equipment it will jeopardize the warranty on the equipment and Motorola will not certify the intrinsic safety of the equipment.

In 1983, Brown and Root, Inc., a construction firm which does extensive work in the petroleum industry, purchased MX Series batteries from us. Within several weeks, Motorola contacted them stating that Alexander batteries were not approved and that they would not certify the intrinsic safety of the communications equipment.

When our sales department and distributors approached other petroleum-related firms, they were told that Motorola had already contacted them to tell them that Alexander batteries are not approved, and they would void warranties and not guarantee intrinsic safety if Alexander products are used.

Motorola has been able to use the fact that Factory Mutual is the authoritative standard-setting organization in this field, effectively barring Alexander Manufacturing from the intrinsically safe battery market.

Our salespeople report that many customers have expressed interest in purchasing our product. Our prices are more competitive than those offered by current suppliers. However, for most purchasers, Factory Mutual approval is a necessary prerequisite.

In 1978, one of our customers, Mr. Robert Black, director of signal communications for Exxon Corp., personally visited Factory Mutual and requested that they test our batteries with Exxon's Motorola equipment. Factory Mutual refused.

Ultimately, what you have is a standard-setting organization which is able to control competition to the detriment of both Alexander Manufacturing and the customer.

Competition gives consumers the opportunity to shop for the best price, to choose the company that provides the best service and quality.

In the replacement battery market, consumers are being robbed of the choices because of the principal standard-setting organization. Factory Mutual has imposed unreasonable product testing approval standards which exclude small businesses like Alexander Manufacturing from the market, thereby hindering both competition and innovation.

In competition with normal batteries, we normally get 50 percent of the replacement market from Motorola or other manufacturers. We aren't even getting 1 percent in the intrinsically safe market.

MET and CSA both approved our batteries with the equipment, schematics, the radio, and the batteries we supplied, all of which we can, and did, supply. Factory Mutual refuses to test without Motorola's approval, claiming priority information.

I ask what priority information? The schematics have been published. If, indeed, other such priority information was needed, FM

didn't tell us what and, obviously, Motorola wouldn't either. But the point is, neither CSA or MET needed anything more than what was already published and what we gave them.

Mr. Chairman, I have but one final comment this morning that I would like to add at this point.

Last night I reviewed, and I must say very carefully, the testimony Factory Mutual is about to present to this committee. Mr. Chairman, I was extremely disappointed to find that absent from Factory Mutual's testimony was a proposed plan for resolution of this matter. I must say, Congressman, to date, I have refrained from entering into a lawsuit against Factory Mutual and Mine Safety. And, Mr. Chairman, this is, of course, a last resort, one that I hope that I will never have to pursue. But, Mr. Chairman, concrete plans to resolve this issue today by Factory Mutual would diminish any impact that this hearing may have in providing a fair resolution of this issue.

I sincerely hope, Mr. Chairman, that Factory Mutual will address this equipment. Failure to do so will leave our company and other small businesses like ours with no other choice but to seek judicial resolution. And, Mr. Chairman, that would be most unfortunate.

Mr. Chairman, that concludes my remarks for this morning. I would be happy to answer any questions you might have.

[Mr. Alexandres' prepared statement with attachments follows:]

PREPARED STATEMENT OF RICHARD ALEXANDRES, PRESIDENT, ALEXANDER MANUFACTURING CO.

Goodmorning Chairman Bedell. My name is Richard Alexandres and I am the President of Alexander Manufacturing Company which is located in Mason City, Iowa.

Mr. Chairman, before I begin my testimony, I would like to take this opportunity to thank you for your efforts on behalf of small business men and women in Iowa and around the nation, and particularly for scheduling this hearing on the impact of product testing approval policies on small business.

Alexander Manufacturing Co. produces and markets small batteries, both primary and secondary, along with the allied charging equipment for commercial use.

In 1976 we expanded our line to include intrinsically safe replacement batteries for portable communications equipment. An intrinsically safe battery is one which is used in areas where the production of any type of spark would cause an explosion. For example, these batteries are particularly useful in mines where highly flamable methane gas is present. We believe the annual market for intrinsically safe batteries to be over twenty million dollars.

For the past eight years we have attempted to secure an intrinsically safe rating for one battery and have been unable to do so. While our product has met the standards for evaluating intrinsic safety employed by both private and public sector testing laboratories we have been unable to get the two major testing organizations, Factory Mutual or the Mine Safety and Health Administration to test our product. Their unwillingness to test Alexander's Intrinsically Safe Batteries has effectively prevented us from marketing our product which is less expensive

than the batteries currently on the market.

In late 1976 we approached Factory Mutual Research, Inc. and asked them to test our batteries for intrinsic safety. Factory Mutual informed us that under the guidelines outlined by the National Fire Protection Association for evaluating intrinsic safety they could not test our batteries as a separate entity. These guidelines require that intrinsic safety be treated as a system concept, meaning that the battery must be tested in connection with the equipment in which it will be used.

Our batteries are specifically designed to be used in communication equipment manufactured Motorola Communications and Electronics Corporation.

Motorola produces both communications equipment and the batteries necessary to power such equipment. Motorola has intrinsically safe ratings for both the equipment and its own batteries. Because Motorola manufactures both products they had no difficulty meeting the system requirement.

In order to conduct intrinsic safety tests on our replacement batteries, Factory Mutual requires that we obtain a letter from the Motorola authorizing Factory Mutual them to use information from Motorola's files to evaluate our product. Furthermore, Motorola would have to agree to include a statement on their radios identifying our batteries as alternatives to the presently approved battery packs, which are manufactured by Motorola.

Factory Mutual refused to test our product unless we could obtain full cooperation from the radio manufacturer.

We requested that Motorola cooperate with us and allow us to use their communications equipment to test our batteries. To date they have not given us an answer. Intrinsically safe batteries sell for $100.00 in the United States and $250.00 in Canada. If Alexander received Factory Mutual approval we would be competing for the lucrative business of selling replacement batteries.

Motorola is currently the primary supplier of replacement batteries for Motorola portable communications systems. As a result of the nature of the standards for evaluating intrinsic safety, Motorola is able, if it choses, to completely exclude competitors from entering the market place without their permission.

In our attempts to have our battery tested, we also approached the Labor Department's Mine Safety and Health Administration's Approval and Certification Center. They also refused to test the battery pack alone, stating that the approval holder, in this case Motorola, would have to request that its approval be extended to our batteries - replacement would have to be "officially accepted as part of an approved piece of equipment" before they could be used in mines.

In 1980 the Canadian Standards Association tested one of our battery packs and found it to be intrinsically safe when used with Motorola transreceiver Types HT220 and MT500. We advised Factory Mutual and The Mine Safety and Health Administration of the Canadian Certification. However, we have still not been able

to obtain an intrinsically safe rating in the United States until MET, Inc. approved our batteries recently.

The issue that we at Alexander Manufacturing have confronted for nearly eight years is that standards setting organizations and testing labs are able to control who may participate in the marketplace by imposing unreasonable standards and requirements on would be competitors.

Alexander Manufacturing is trapped in a Catch-22 situation. We cannot compete in the market for replacement batteries without first obtaining the full cooperation of our potential chief competitor.

MET Electrical Testing Company, Inc., a small for-profit testing lab in Baltimore, tested our batteries as stand alone devices to be used in conjunction with the Motorola MX 300 Series FM two way radio system. MET concluded that our battery is in compliance with the appropriate regulations for use in a Class 1, Division 1, Groups C&D Methane Atmosphere. The United States Coast Guard has approved MET's testing procedures for qualifying our product for use on U.S. Merchant Vessels. However, without Factory Mutual and Mine Safety Administration approval our product is still not marketable in most industries.

Factory Mutual is generally recognized in many industries as the authority for determining intrinsic safety. Without their approval we cannot market our batteries in certain industries. This has been a particular problem when we have attempted to market our batteries to petroleum companies. For instance, a representative of Amoco Oil Company informed us that all

communications batteries must have Factory Mutual approval.

Similarly Exxon Corporation will not purchase batteries unless they are approved by the appropriate regulatory agency. In the petroleum industry Factory Mutual is recognized as the authority so without their approval Exxon will not consider purchasing our products.

Motorola has made this situation worse. They have engaged in a sales campaign wherein they assert that if replacement batteries not approved by Factory Mutual are used in their equipment it will jeopardize the warranty on the equipment and Motorola will not certify the intrinsic safety of the equipment.

In 1983 Brown and Root, Inc., a construction firm which does extensive work in the petroleum industry, purchased MX series batteries from us. Within several weeks Motorola contacted them stating that Alexander Batteries were not approved and that they would not certify the intrinsic safety of the communications equipment.

When our sales department and distributors have approached other petroleum-related firms they have been told that Motorola had already contacted them to tell them that Alexander batteries are not approved and that they would void warranties and not guarantee intrinsic safety if Alexander products are used.

Motorola has been able to use the fact that Factory Mutual is the authoritative standard setting organization in this field, effectively barring Alexander Manufacturing from the intrinsically safe battery market.

Our salespeople report that many customers have expressed interest in purchasing our product. Our prices are more competitive then those offered by current suppliers. However, for most purchasers Factory Mutual approval is a necessary prerequisite.

In 1978 one of our customers. Mr. Robert Black, Director of Signal Communications for Exxon Corporation personally visited Factory Mutual and requested that they test our batteries with Exxon's Motorola equipment. Factory Mutual refused.

Ultimately, what you have is a standard setting organization which is able to control competition to the detriment of both Alexander Manufacturing and the consumer.

Competition gives consumers the opportunity to shop for the best price, to chose the company that provides the best service. In the replacement battery market, consumers are being robbed of these choices because the principle standards setting organization, Factory Mutual, has imposed unreasonable product testing approval standards which exclude small businesses like Alexander Manufacturing from the market thereby hindering both competition and innovation.

U.S. DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION
APPROVAL AND CERTIFICATION CENTER
R. R. 1, Box 201B
Industrial Park Blvd.
Triadelphia, West Virginia 26059

APR 15 1980

Reply to Attn of
MSHA:A&CC:IS&I

Alexander Manufacturing Company
Attn: Susan K. Stinson
409 S.E. 28th Avenue
Pompano Beach, Florida 33062

Dear Ms. Stinson:

This refers to your letter of April 7, 1980, concerning the approval of battery packs for use in Mine Safety and Health Administration approved instruments.

The Mine Safety and Health Administration approves complete instruments which may contain batteries. However, the battery packs are not approved by themselves.

The rationale behind this policy is as follows. An intrinsic safety analysis is conducted as a portion of the instrument approval process. For MSHA purposes, intrinsically safe circuits are incapable of causing an ignition of a methane-air, methane-coal dust-air, or coal dust-air mixture under normal or specified abnormal conditions.

By its definition, intrinsic safety is a system concept. Therefore a battery pack must be evaluated in conjunction with the circuit it will power. At the present time, we have no means of approving battery packs as stand alone items. The use of your battery pack in an approved instrument would violate the approval unless the approval holder gets its approval extended to include your battery pack as an optional item.

MSHA does conduct intrinsic safety tests of subsystems designed for future incorporation into approved equipment but they cannot be used in mines until they are officially accepted as part of an approved piece of equipment. An application procedure covering intrinsic safety evaluations is enclosed.

Sincerely,

Robert P. Lenart

Robert P. Lenart
Chief, Intrinsic Safety and Instrumentation Branch

Enclosure

DO YOU WANT TO PROCEED?

(6)

Factory Mutual Research

1151 Boston-Providence Turnpike
P.O. Box 688
Norwood, Massachusetts 02062
Telephone (617) 762-4300
Telex 92-4415

September 8, 1983

Mr. Peter Benson
Alexander Manufacturing Co.
Box 1645
Mason City, Iowa 50401

Subject: Batteries for Hazardous Locations

Dear Mr. Benson:

As a follow-up to our recent phone conversations, I would like to restate Factory Mutual's policy for evaluating your batteries. We would require a letter from the radio manufacturer giving us authorization to extract information from their files, for the purpose of evaluating your batteries for use with their approved products.

Additionally, the radio manufacturer would have to include a statement on their radios which would identify your batteries as alternates to the presently approved battery packs. If you can obtain the cooperation from the radio manufacturer's as outlined above, then we can proceed with an approval program of your batteries.

If you have any additional questions, please let me know.

Very truly yours,

R. L. Martell, Jr.
Manager
Instrumentation Section

RLM/pj

(9)

Canadian Standards Association
178 Rexdale Boulevard, Rexdale, Ontario, Canada M9W 1R3
Association canadienne de normalisation
Telex 06 989344 / Cable Canstan

(416) 744-4143

FILE NO. LR 44049-1

September 23, 1980

Mr. R. Alexander,
President,
Alexander Mfg. Co.,
Box 1645,
1511 S. Garfield Place,
Mason City, Iowa 50401

Subject: Rechargeable Nicad Battery P/N H8232 as Intrinsically Safe for Hazardous Location Class I, Group D for Use with Certified Motorola HT220 Transceiver Omni Version

Gentlemen:

We have pleasure in informing you that the subject equipment, incorporating modifications required (if any), is considered to comply with the applicable CSA requirements. This equipment is therefore eligible to bear the CSA Mark in accordance with instructions contained in previous correspondence.

The Advisory Council on Electrical Safety comprising electrical inspection authorities throughout Canada will be informed that your equipment is being listed as CERTIFIED.

This certification is granted subject to CSA's findings being accepted by this Council.

The details shown on the attached draft will be published as a Certification Card.

Yours truly,

L. J. Ballantyne,
Environmental Products Section,
Certification Division.

LJB/jsw
Attach.

cc: Prairie Region
cc: Mr. G. E. Irving,
G. E. Irving Ind. Ltd.,
2217A Dunwin Dr.,
Mississauga, Ont.
L5L 1X1

(7)

The name of the Association is protected by letters patent of incorporation and its certification marks "CSA" and Monogram "@" are [illegible] and authorized by CSA

Mr. BEDELL. Thank you very much, Mr. Alexandres.

We are told that they need to set up a projector for Mr. Martin, so we will proceed with Mr. Leonard Frier, president of MET Electrical Testing Co. in Baltimore, MD.

It had been our plan to take all three and then ask questions of all three, unless there is objection on the subcommittee.

TESTIMONY OF LEONARD FRIER, PRESIDENT, MET ELECTRICAL TESTING CO., INC.

Mr. FRIER. Thank you, sir.

My name is Leonard Frier, and I am president of MET Electrical Testing Co., Inc., of Baltimore, MD.

MET is a small, independent electrical testing laboratory which has been in business for 25 years. We provide all types of electrical testing, evaluations, analysis, and associated services. We have more than 80 employees, including 20 professionals and 50 highly qualified technicians, and all types of electrical testing instruments and equipment.

One type of work with which MET Electrical is considerably experienced is product approval or certification. The process of certification, as generally understood, is the proof that a product conforms to a particular standard. This proof is confirmed by a seal or label affixed to the product and by a classification or listing made available to the ultimate product user.

The basis for such listing and labeling is the certifier's verification that a reasonable and representative sampling of the product conforms to the appropriate and identifiable standard.

Product certification is a valuable service to the public; it promotes the public's health, safety, and well-being by assuring that the products meet acceptable standards of safety and performance.

The certification of manufactured products in the modern American economy is a complex and multifaceted service provided by diverse classes of organizations, ranging from manufacturers themselves to Government entities and code authorities. Its purposes are similarly diverse; certification is a marketing tool, a means for satisfying building code requirements, and an adjunct to quality control programs.

One form of certification work that has been particularly frustrating and troublesome to my company and to many other U.S. independent testing laboratories is the area of safety labeling of electrical products and fire safety of building products.

In these fields, instead of developing criteria or a program for judging the competence of all certifiers, sponsors of national code groups traditionally choose to recognize only specific certifiers. Local code authorities adopting these national codes come to identify product approval by certifiers not with a general set of procedures or qualifications to recognize any competent laboratory, but with one or a few nationally recognized laboratories.

The practice of finding that only the code-designated company was qualified to certify has significantly inhibited free and open competition in these product areas and markets.

In the past 15 years, the Federal Government has initiated efforts to rectify this problem, but no substantial remedy has yet been implemented.

In 1973, OSHA promulgated part 1907: "Procedures for Accrediting Testing Laboratories." But as of this date, OSHA has still not accredited its first testing laboratory.

MET's frustration in waiting 9 years for OSHA to recognize other testing laboratories resulted in our filing suit in Federal Court against OSHA to either implement part 1907 or delete all references to approval in any of the OSHA standards. OSHA is presently undergoing hearings for a new rule which would accredit testing laboratories.

In 1976, the Senate Antitrust and Monopoly Subcommittee proposed a regulation, S. 3555, "The Voluntary Standards and Certification Act of 1976", aimed at regulating the standards and certification industry and correcting this problem.

This regulation was deferred to the next session of the Senate and was then entitled S. 825, Standards and Certification 1977." The bill would have required recognition of qualified laboratories and standards writing groups. Both of these bills never came out of committee.

In 1977, the Federal Trade Commission, Bureau of Consumer Protection, Division of Product Reliability, began an investigation into the antitrust aspects of standards and certification. The investigation included public hearings, at which more than 200 witnesses testified.

This proposed rule and staff report was published on December 7, 1978, in the Federal Register. The rule would establish prohibitions and requirements for standards developers, certifiers, and persons referencing standards or certification in the marketing of products.

Public hearings were held in 1979 and a final staff report was published in April 1983. Although the staff recommended a final rule, the Commission disagreed. Instead, it recommended that only individual actions be taken to remedy violations in the standards and certification areas. To date, and to my knowledge, I know of no such action ever being taken.

Not only has the Federal Government failed in these efforts to solve this problem of domination of the safety labeling market by a few nonprofit entities like Underwriters Laboratory and Factory Mutual; in fact, the Government continues to perpetuate the problem.

An example: In the Federal Register of Friday, January 16, 1981, "Electrical Standards, OSHA," it is stated:

> Labeling refers to the label of a nationally recognized testing laboratory such as Underwriters Laboratory, Inc., or Factory Mutual Engineering Corporation, which indicates that the equipment in question has met criteria set by that laboratory for electrical safety . . . if equipment is required by the subpart to be "approved," equipment which is "labeled" is acceptable to OSHA.

In 46 Code of Federal Regulations, Subpart 108.497(c), it states:

> An oxygen and explosive meter must bear the Underwriters Laboratory, Inc., label or the Factory Mutual label, as part of the fireman's outfit.

The General Services Administration requires that electrical equipment be listed on the approved product list for purchases by UL.

In addition to these problems, other problems exist, such as with MSHA, and the testing of intrinsically safe devices for use in mines. The Code of Federal Regulations require MSHA to do all testing on all products which they approve for use in mines. This regulation precludes all testing laboratories from gaining any acceptance. However, with MSHA, there is accountability.

Accordingly, an independent testing laboratory like MET must first become qualified, competent, facilitated, and then proceed with the most difficult task of changing legislation in order to obtain business in the area of safe labeling of products. Many regulations are presently being changed. Some are our efforts and some efforts are by the entire independent laboratory community; namely, the American Council for Independent Laboratories, and some by initiation by the agency itself.

MSHA, for example, is initiating, on its own, part 37, "Alternate Product Approval Procedures." This is now in rulemaking, and this should allow our qualified independent laboratories of new and innovative equipment manufacturers to enter the market.

However, in addition to the Federal Government, numerous States, cities, and municipalities have statements in laws, ordinances, and regulations that products must be labeled by Underwriters Laboratory or Factory Mutual, Inc.

Many of the municipalities and even some Federal Government agencies are changing and agreeing to accept services of other qualified independent laboratories. However, until we have secured the approval of absolutely every State, city, and Federal agency, we cannot offer ourselves as a competitive source for responsible independent electrical testing to manufacturers.

The result is that manufacturers must be willing to accept a limited market when using our service. For example, services we are now providing to some manufacturers will not allow these manufacturers to sell their products in the city of Chicago and some other jurisdictions in the United States.

We are, at our own expense, suing the city of Chicago to recognize the MET label. Although Chicago is only one city, in one State, it can be seen that by providing a manufacturer a limited market we certainly are not being competitive. However, with some manufacturers, there is no recourse.

Underwriters Laboratory may not have a standard for a product, may not be capable of testing the product, or may not be interested in testing the product. In such cases, manufacturers have no choice but to come to a laboratory such as MET and accept limited marketing opportunities we provide, until such time as the manufacturer's business increases, or the required standard is developed in some other way, or it fits into UL's schedule.

As soon as this occurs, the manufacturer will leave us and go to Underwriters Laboratory; or if the case is Factory Mutual, at a greater cost, in order to assure himself the national market sales of his product.

In sum, it is still the case that in several product areas there exists a virtual monopoly in testing and certification. Frequently,

the monopoly is a direct result of Government action. Therefore, the Federal Government should act forcefully to correct this situation.

First, OSHA should promptly implement part 1907. Second, appropriate Federal officials should initiate a vigorous program of education of other Federal, State, and local officials to point out how the current laws, policies and practices of such officials violate the spirit of the antitrust laws. Where such Government officials promote or perpetuate anticompetitive practices, these officials should be encouraged to take immediate action to remedy the situation.

Mr. Chairman, it must be recognized that when a small, qualified, independent laboratory is denied opportunity adequately to market its label, small innovative manufacturers are also hurt. Manufacturers have diminished initiative to develop new or innovative products if they must wait 2 years, develop special standards and face regulatory roadblocks in order to sell their products. And, honestly, only the small independent laboratory can be sensitive to the needs and understanding of the small, innovative manufacturer.

Thank you for this opportunity to give my views. I will be happy to answer any questions.

[Mr. Frier's prepared statement follows:]

PREPARED STATEMENT OF LEONARD FRIER, MET ELECTRICAL TESTING CO., INC.

My name is Leonard Frier and I am President of MET Electrical Testing Company, Inc. of Baltimore, Maryland. MET is a small independent electrical testing laboratory which as been in business for 25 years. We provide all types of electrical testing, evaluations, analysis and associated services. We have more than 80 employees including 20 professionals and 50 highly qualified technicians; and all types of electrical testing instruments and equipment.

One type of work with which MET Electrical has considerable experience is product approval or certification. The process of certification, as generally understood, is the attestation that a product conforms to a particular standard. This attestation is confirmed by a seal or label affixed to the product and/or by a classification or listing made available to the ultimate product user. The basis for such "listing and labeling" is the certifier's verification that a reasonable and representative sampling of the product conforms to the appropriate and identified standard.

Product certification is a valuable service to the public; it promotes the public's health, safety and well-being by ensuring that products meet accepted standards of safety and performance. The certification of manufactured products in the modern American economy is a complex and multifaceted service provided by diverse classes of organizations, ranging from manufacturers themselves to governmental entities and code authorities. Its purposes are similarly diverse; certification is a marketing tool, a means for satisfying building code requirements, and an adjunct to quality control programs.

One form of certification work that has been particularly frustrating and troublesome to my company and to many other U.S. independent testing laboratories is the area of safety labeling of electrical products and fire

safety of building products. In these fields, instead of developing criteria or a program for judging the competence of all certifiers, sponsors of the national "life safety" model codes traditionally chose to recognize only specific certifiers. Local code authorities adopting these national codes came to identify product approval by certifiers not with a general set of procedures or qualifications to recognize any competent laboratory, but with one or a few "nationally recognized" laboratories. The practice of finding that only the code-designated company was qualified to certify has significantly inhibited free and open competition in these product areas and markets.

In the past 15 years, the Federal Government has initiated efforts to rectify this problem, but no substantial remedy has yet been implemented. In 1973, OSHA promulgated Part 1907: "Procedures for Accrediting or Testing Laboratories". But as of this date OSA has still not accredited its first testing laboratory. MET's frustration in waiting nine years for OSHA to recognize other testing laboratories resulted in our filing suit in Federal Court against OSHA to implement Part 1907 or delete all references to approval in any of the OSHA standards. OSHA is presently undergoing hearings for a new rule which would accredit testing laboratories.In 1976 the Senate Anti-trust and Monopoly Subcommittee proposed a regulation - Senate Bill S3555: "The Voluntary Standards and Certification Act of 1976" aimed at regulating the standards and certification industries and correcting this problem. This regulation was deferred to the next session of the Senate and was then entitled "Senate Bill 825 Standards and Certification 1977". The bill would have required recognition of qualified laboratories and standards writing groups. Both of these bills never came out of committee.

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Not only has the Federal Government failed in these efforts to solve this problem of domination of the safety labeling market by a few nonprofit entities like Underwriters Laboratories and Factory Mutual; in fact, the Government continues to exacerbate the problem.

Examples: - In the Federal Register of Friday, January 16, 1981, "Electrical Standards, OSHA", it is stated:· "Labeling, refers to the label of a nationally recognized testing laboratory such as Underwriters Laboratory, Inc., or Factory Mutual Engineering Corporation, which indicates that the equipment in question has met criteria set by that laboratory for electrical safety....if equipment is required by the subpart to be 'approved', equipment which is 'labeled' is acceptable to OSHA."

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The result is that manufacturers must be willing to accept a limited market when using our services. For example, services we are now providing to some manufacturers will not allow these manufacturers to sell their products in the City of Chicago and some other jurisdictions in the United States. We are, at our own expense, suing the City of Chicago to recognize the MET label. Although Chicago is only one city, in one state, it can be seen that by providing a manufacturer a limited market we certainly are not being competitive. However, with some manufacturers, there is no recourse. Underwriters Laboratories may not have a standard for the product, may not be capable of testing the product, or may not be interested in testing the product. In such cases, manufacturers have no choice but to come to a laboratory such as MET and accept limited marketing opportunites, until such time as the manufacturer's business increases, or the required standard is developed or in some way, it fits into UL's schedule. As soon as this

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In sum, it is still the case that in several product areas there exists a virtual monopoly in testing and certification. Frequently, the monopoly is a direct result of government action. Therefore the Federal Government should act forcefully to correct this situation.

First, OSHA should promptly implement Part 1907. Second, appropriate Federal officials should initiate a vigorous program of education of other Federal, state and local officials to point out how current laws, policies and practices of such officials violate the spirit of the antitrust laws. Where such government officials promote or perpetuate anticompetitive practices, these officials should be encouraged to take immediate action to remedy the situation.

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Thank you for this opportunity to give my views. I will be happy to answer any questions.

Mr. BEDELL. Thank you very much, Mr. Frier.

Mr. Martin, I am advised that the bulb is still burned out on your projector. I guess you are going to have to operate without your projector.

TESTIMONY OF EDWARD J. MARTIN, NU FIRE PRODUCTS, INC., ACCOMPANIED BY JOSEPH M. MINKOVITCH, PRESIDENT, AND MICHAEL CAMPISANO, VICE PRESIDENT

Mr. MARTIN. Thank you, Mr. Bedell. My name is Edward J. Martin. I am one of the three principals of Nu Fire Products.

Mr. BEDELL. Was your bulb properly tested and certified?

Mr. MARTIN. Yes, having trouble getting it certified.

Mr. BEDELL. OK.

Mr. MARTIN. I have with me this morning, also, two of the other principals of Nu Fire Products: Mr. Minkovitch, who is the president of Nu Fire Products; and Mike Campisano, who is with me this morning. Those two gentlemen standing over there.

Mr. BEDELL. OK.

Mr. MARTIN. First of all, I want to thank you for inviting us down here this morning. We have been at this approximately 10 years trying to get our product into the marketplace.

Unlike the other two gentlemen, we actually have a suit under way against Factory Mutual in Norwood, MA. The suit commenced in January of 1983, simply because we were totally frustrated in our attempts to get our product tested in a fair and reasonable manner.

Nu Fire Products has been attempting to market a simple and effective low-cost fire extinguisher designed to extinguish small incipient fires of any kind.

We believe a great need exists for this type of fire extinguisher, especially in the kitchen, where 62 percent of all home fires originate and where splashing and spreading grease fires from pressurized fire extinguishers can be a severe problem.

Hand portable fire extinguishers cannot be sold or displayed for sale in 44 out of the 50 States without prior approval of a nationally rated testing laboratory. Even in those States without a statute or regulation requiring such approval, a fire extinguisher will have little market acceptance without a seal from a recognized laboratory.

There are but two testing laboratories: Underwriters Laboratories, Inc., Northbrook, IL, and Factory Mutual Research Corp. of Norwood, MA. As a result, these laboratories control market access in law and in fact. Both laboratories have developed performance standards for hand operated fire extinguishers. These standards become the basis of the testing laboratories either passing or rejecting new products into the marketplace. These performance standards are basically applied to metal pressurized fire extinguishers. Because our product is a low density polyethylene plastic, it falls outside most of the existing performance standards. As a result, testing laboratories may act arbitrarily in selecting applicable standards and in testing units for performance where no standards exist.

At the outset, it should be noted that our product passed every fire test imposed by Factory Mutual Corp. I have a copy of a complaint that was served on Factory Mutual Corp. by Nu Fire Products as a result of our inability to get what we considered to be fair and reasonable test procedures. The complaint sets forth our substantive allegations concerning Factory Mutual's testing of our product.

I would like to just briefly go over our experience with Factory Mutual. It covers a period from approximately late 1979 until November 13, 1981, when we, at that point in time, decided to initiate litigation against the Factory Mutual Research Corp.

We have a very unique product, and I believe I have a sample of it here which I would like to show the committee.

[Sample shown.]

Mr. MARTIN. We had hoped to demonstrate by the film how this unit works. It is very capable of putting out what is known as a 5-square-foot pan fire, or a 2B fire. I don't know if anybody here has seen a 2B fire, but it is a fire that is a 5-square-foot pan and it contains 2 gallons of heptane gasoline. What happens, actually, is they give it a 1-minute preburn, and this unit has to extinguish that fire within an allocated time—I believe it is 1 minute.

This fire actually has a vertical flame spread of upward to 15 feet. It has heat intensity anywhere from 6 to 8 feet. You couldn't get near it—you have to have a qualified firefighter to go in and extinguish the fire because of its intensity. Our unit actually passed the fire performance test later on in 1980.

But when you bring a unit like this to a research laboratory, or an approval laboratory like Factory Mutual, you really don't know exactly what to expect. You show them your product, and they tell you that you have to pass the standard that applies to units of this type, which is Factory Mutual standard No. 5300.

Now, we brought this unit in early 1980 to Factory Mutual. At that time, since it was quite a departure from the pressurized metal units for which the 5300 standard was written, they advised us that probably the best thing to do would be to try to see if our unit could put out a basic fire—wastepaper basket fire. And if this wastepaper basket fire was extinguished, then we could go on to talk about where we could go from that particular point.

So we left four units with Factory Mutual. Factory Mutual, at this point, decided to conduct not only a wastepaper basket fire but an oven-aging test and also a vertical—they actually held the unit at a 45-degree vertical and tried to expel 80 percent of the powder within a timeframe of 1 minute.

We were never advised that these other tests were going to be conducted. At the outset, the whole purpose of conducting the wastepaper basket fires by inexperienced workers in the office was merely to see if the unit could in fact put out a fire.

The results of these secret tests, unbeknownst to us, were that the unit was placed in an oven and the bottom of the unit evidently softened. And, according to Factory Mutual, the results of the vertical test was that the unit could not expel more than 3 ounces of powder in a 1-minute period of time.

In March of 1980, Factory Mutual wrote Nu Fire Products a letter stating that they would like to conduct a fire performance

test using inexperienced operators to extinguish a 5-square-foot pan fire. Now, if you think about that for a minute—inexperienced office workers to extinguish a 5-square-foot pan fire. Well, we felt that Factory Mutual was actually setting up a barrier right from the beginning. So, when we received this letter we went out to talk to them in Norwood—not too far from where we live, as a matter of fact. At that time, they disclosed to us that they also had taken one of these units and put it into an oven and conducted an oven-aging test which was a complete surprise to us.

Now, as a result of that visit in February of 1980, and the subsequent letter written by Factory Mutual to Nu Fire, we objected very strenuously to the use of inexperienced operators to extinguish a 5-square-foot pan fire. They changed from inexperienced operators to the professional firefighters, the qualified personnel—as it says in the agreement—to conduct the test.

However, it put us on our alert that we were not being treated too reasonably or too fairly at this point.

As we go along now to August 1980, this particular project was assigned to a project engineer by the name of David Smith, who was assigned to the case. Now, David Smith, at that time, was apprised by the people at Factory Mutual that the secret test had been conducted. And at this time, David Smith knew that the nonperformance of the unit above the horizontal plane would in fact not allow Factory Mutual to approve this unit. But nevertheless, David Smith, who is a representative of Factory Mutual, at that point had started to prepare for a fire performance test to be conducted sometime in the fall, even though he knew and Factory Mutual knew, that our unit was never going to be approved by Factory Mutual because of this vertical test.

In the meantime, we had reviewed standard 5300 and could not find anywhere in standard 5300 a vertical performance test. In other words, this particular standard that Factory Mutual selected to take a stand on was not included in their 5300 standards.

And to make matters almost amusing, that particular standard we could pass anyway. In other words, we had privately taken our unit and discharged somewhere around 30 ounces of powder in the minute.

So going on in the fall of 1980, David Smith, who was assigned the task of conducting these fire tests, sat down with myself and Mr. Minkovitch and determined the balance of the engineering tests that would have to be met if we were to successfully pass the fire performance test that was upcoming on October, 27, 1980.

In other words, when we sat down with the representatives of Factory Mutual, they convinced us that should we pass the fire performance test in October, they would then determine the balance of the engineering tests necessary for Factory Mutual to approve this fire extinguisher.

Standard 5300 was laid out on the table, and Minkovitch and myself and Mr. Smith, determined which of those standards were going to be applied to this unit, because it is not metal and it is not pressurized.

Now, on October, 27 the fire performance tests were conducted in Rhode Island on our unit. Four days prior to the October 27 fire performance tests, on October 23, 1980, a meeting was held at Fac-

tory Mutual in which the ability of the fire extinguisher to perform above the horizontal plane was again discussed with the idea of blocking Nu Fire Products from getting an approval.

At the same time, Factory Mutual was planning a test program with Nu Fire Products. It seems contradictory, we know it is not.

On October 27, 1980, Nu Fire Products successfully completed all of the fire performance tests that Factory Mutual established for Nu Fire Products.

On November 4, 1980, Factory Mutual wrote Nu Fire Products and in the letter stated that Nu Fire Products had successfully completed all of the fire performance tests that were necessary for this unit, and now to move forward and pass the engineering tests that were established by Mr. Smith and the two of us that represented Nu Fire Products.

Factory Mutual also included a second letter, dated November 4, 1980, which specified the remaining engineering tests that needed to be passed. And on that date also, Factory Mutual sent us an application for approval, which simply means that once—yes, sir?

Mr. BEDELL. Mr. Martin, we are short on time.

Mr. MARTIN. All right.

Mr. BEDELL. I would appreciate it if you would summarize this as quickly as you can. We want to know the relevant points but some of this detail, I think, is not necessary for our hearing.

Mr. MARTIN. All right.

In essence, to sum up, I would say, although FM had made a final report that the product had passed all performance tests. Factory Mutual imposed a new performance test before Nu Fire Products could accept the final nonperformance engineering test.

Factory Mutual sought to impose nonstandard testing requirements on the product.

Factory Mutual employees made disparaging comments about the product.

Factory Mutual refused to release the results of its secret testing of the product.

Factory Mutual conducted performance testing in plaintiff's absence contrary to the agreement of the parties.

Factory Mutual refused to work with the plaintiffs to develop appropriate performance standards.

Factory Mutual failed to disclose its testing requirements.

Factory Mutual required that the product be subjected to performance testing after it had already passed those tests.

Factory Mutual would not discuss these matters until Nu Fire Products paid to Factory Mutual approximately $1,000.

Factory Mutual first insisted that inexperienced operators test the product contrary to their stated practices.

Factory Mutual failed to fairly, fully, and openly apply its testing procedures to the Nu Fire product.

[Mr. Martin's prepared statement follows:]

PREPARED STATEMENT OF EDWARD J. MARTIN, NU FIRE PRODUCTS, INC.

Nu-Fire Products has been attempting to market a simple and effective low cost fire extinguisher designed to extinguish small incipient fires of any kind. We believe a great need exists for this type of fire extinguisher, especially in the kitchen, where

62 percent of all home fires originate and where splashing and spreading grease fires from pressurized units can be a severe problem.

Hand portable fire extinguishers cannot be sold or displayed for sale in 44 out of the 50 states without prior approval of a nationally rated testing laboratory. Even in those states without a statute or regulation requiring such approval, a fire extinguisher will have little market acceptance absent a seal from a recognized laboratory. There are but two testing laboratories, namely Underwriters Laboratories, Inc., Northbrook, Illinois, and Factory Mutual Research Corp., Norwood, Massachusetts. As a result, these laboratories control market access, in law and in fact.

Both laboratories have developed performance standards for hand operated fire extinguishers. These standards become the basis of the testing laboratory's either passing or rejecting new products into the marketplace. These performance standards are basically applied to metal pressurized fire extinguishers. Because our product is a low density polyethelyne container and contains no pressure, it falls outside most of the existing performance standards. As a result, testing laboratories may act arbitrarily in selecting applicable standards and in testing units for performance where no standards exist.

At the outset, it should be noted that our product passed every fire test imposed by Factory Mutual Research Corporation. Attached is a copy of a complaint served on Factory Mutual Research Corporation as a result of its testing of our product. The complaint sets forth our substantive allegations concerning Factory Mutual's testing of our product. The following, however, will augment those allegations:

Paragraph 20: Factory Mutual refused to test our unit for "approval." Rather, Factory Mutual required that before it would conduct approval testing, we first had to demonstrate that the unit could extinguish fires. The only other time Factory Mutual imposed a "dual testing" format was when a manufacturer specifically requested such a format.

Paragraph 21: The fire tests proposed by Factory Mutual were of such intensity that the personnel conducting the test were required to wear protective garb. Nonetheless, Factory Mutual intended to test our units using untrained secretaries—a test format never imposed on other manufacturers.

Factory Mutual had agreed that we could be present at all tests. However, in early 1980 Factory Mutual performed secret tests on the product which did not involve "fire performance," notwithstanding that that was all they said they were going to do. Although Factory Mutual claimed they did these tests in order to save us money (i.e., if we failed, we would not need to proceed with the further testing), they did not advise us of the results of this test (they claimed the unit failed one of these tests) until well into the testing program, even though the alleged failure of the product would have prevented the unit's receipt of Factory Mutual approval.

Paragraph 22: The testing of our unit was not scheduled until many months after we had signed Factory Mutual's contract. Other manufacturers submitting products to Factory Mutual for testing in that time period were not required to wait that long to have the tests scheduled.

Paragraph 25–26: The above-the-horizontal test was not a part of the standard by which our product was to be tested; it was not a fire performance test which were the only tests Factory Mutual said it would perform, and the timing of the notice precluded our going forward with the balance of the approval testing at that time. Moreover, Factory Mutual had still not told us that in early 1980 they had performed other secret tests that would prevent our product's approval.

Paragraph 28: Factory Mutual's claim that the product could only perform above-the-horizontal when it was held in an unorthodox manner is particularly disturbing because Factory Mutual had done no engineering studies of this unit, and its then personnel had never tested such a unit. We question how the unit's operation could be termed unorthodox when Factory Mutual had no baseline to establish orthodoxy.

Paragraph 29: Other manufacturers of fire extinguishers (large producers) would receive written reminders when the 90-day expiration period approached and were allowed to proceed notwithstanding expiration of the 90-day contract acceptance period. Factory Mutual also refused to proceed with approval testing because they allege we advised of a dimensional change in the unit. We never made such a statement nor could we make such a change since the unit is under patent. Moreover, once we assured them that there was no change, Factory Mutual never proceeded with the remaining tests.

Mr. BEDELL. Thank you very much.

Mr. MARTIN. You are welcome.

Mr. BEDELL. Mr. Sisisky.

Mr. SISISKY. Mr. Chairman, I will start with the last witness, Mr. Martin.

Obviously, the case is in litigation. I am not an attorney—but he has made some accusations concerning the intent of the company doing the testing. I don't know whether we should be involved. That is up to you. I would rather not ask questions.

Mr. Alexandres, you said that the batteries sell for $100, and $250 in Canada?

Mr. ALEXANDRES. Right.

Mr. SISISKY. What price do you sell them for?

Mr. ALEXANDRES. We would probably be around $70.

Mr. SISISKY. About $70, which is a pretty good discount.

What other products do you make?

Mr. ALEXANDRES. Like I said, chargers, and testers that test these type of batteries.

Mr. SISISKY. Do you have any problem with those products?

Mr. ALEXANDRES. No.

Mr. SISISKY. Maybe I don't understand, and maybe, Mr. Frier, you can join in this colloquy. Let's take, for instance, a simple single cell flashlight—important if you were in a mine, I would assume.

If he makes a battery for that—single cell battery—and it's a good battery, do you have to get the permission of every single cell manufacturer in order to test his battery?

Mr. FRIER. Yes, sir. If there is a regulation that says that it must be submitted as part of the whole system, and the only people that make the system are the flashlight manufacturers, and they choose not to use someone else's product as part of their system, there is no way to sell it.

Mr. SISISKY. How about replacement batteries?

Mr. FRIER. If you can't get the initial certification of it—you know, if there is no possible way—I mean, that is probably a little complicated.

Mr. SISISKY. I was trying to do a simple thing rather than something a little complicated.

Mr. FRIER. Mr. Friendlich is also with our lab in a technical way. But let me just mention other products for which certification is required, electrical, fire, and other related items—but particularly electrical products. Whenever they are required to be sold, there are numerous jurisdictions that have control over the safety of citizens in that area, and electrical items—and fire, of course—are one that they choose as having the major control of whose products can or can't be sold in that area.

What these people do is require that certain laboratories test those products in order to say that they are safe for use in that particular area in which this person may have some jurisdiction. And, of course, the Federal Government is included when I am talking about jurisdiction.

If a manufacturer wants to sell this product, he should go to somebody that will test that product so that he only has to go through the process once to get the product tested, and an acceptable label. Once that happens—and he's got an acceptable item, he could sell it anywhere he wants to. It is not a marketing decision

anymore; he's just got a qualified, safe, and responsible piece of equipment to sell competitively in the marketplace.

Some people can only give him limited marketed acceptance, such as MET. He of course, is going to seek the person that could give him the maximum acceptance since he has to go through the process. And, of course, his desire is naturally to go to the two laboratories that will give him national recognition automatically, carte blanche. And that, of course, is Underwriters Laboratory and Factory Mutual, Inc.

There is absolutely no question on an electrical or a fire safety product that either one of these labels are on it.

Mr. SISISKY. Excuse me just a minute.

You know, I look at a display in a supermarket or a drug store that has batteries. I own a flashlight. Now, on that battery it may be UL or whatever it may be, certified, but it doesn't say certified for a Bedell single cell flashlight. Am I on the track?

Mr. FRIER. You are talking about two separate items. When you are talking about intrinsically safe batteries there is a life safety involvement. If you talk about something that plugs into the wall that is electrical that you could use in your home, such as a toaster, or a radio, or a television, or something similar to that—the laws in practically every supermarket, or every jurisdiction that has a supermarket, say that that product must be labeled. And in some areas it must be labeled by a particular organization, and in some areas if it isn't, the person who sells it could even go to jail; it's a misdemeanor.

Mr. SISISKY. OK, maybe I will understand something else.

Mr. FRIER. Now I want to go back to batteries; that is, on the electrical. However, in a mine area—maybe I'm not getting the point across well—in the mine area, however, the battery is a life safety device by itself; it, itself, can cause, if it is not intrinsically safe, a major catastrophe.

Mr. SISISKY. So is a battery, so is a flashlight, in a mine.

Mr. FRIER. As a unit, together, correct.

Mr. FRIENDLICH. If I may, sir.

The flashlight that you are referring to that would be used in a mine is called a cap lamp. It has a headlight, a battery pack on the side. In that case, the battery pack is required to be registered as part of the overall assembly. However, there are many instruments used in the mine which use the single cell batteries that you would buy in the supermarket. In that case, MSHA will accept certain batteries which are identified by what they call their industry standard number; so that if you use that uniquely identified battery, you can put it into an instrument which has been tested as an instrument using that battery, and you can replace it with any manufacturer's battery that falls into that class.

Mr. SISISKY. Let me ask you, Mr. Alexandres, do you know how many replacement batteries are certified for the Motorola, or is it just Motorola?

Mr. ALEXANDRES. No, there are other manufacturers that have intrinsically safe systems. This was an example of one.

[Batteries shown.]

Mr. ALEXANDRES. That is their battery, and this is our battery. They, you know, do the same.

Mr. SISISKY. But your argument is that you cannot enter into the market because they have the proprietary rights, I would assume?

Mr. ALEXANDRES. Not Motorola. It is Factory Mutual's insisting that we have Motorola's approval.

Mr. SISISKY. That is what I am talking about.

Mr. ALEXANDRES. Yes.

Mr. SISISKY. I don't know if we check with our attorneys—whether this is Justice Department—whether this is legal or not. But if it is, it is Motorola who is holding it up and not——

Mr. FRIER. Sir, if I may interject on that. This is exactly the problem. It is very difficult; it is a very complex issue. Alexander battery has the MET label. If everybody would universally accept the MET label, as they do the Factory Mutual label, Alexander has no problem; they would be selling their batteries all over the United States.

In addition to that, if everybody would accept the MET label, I guarantee you, Factory Mutual would test their battery, because they would want to be competitive with MET. Right now they are competitive with no one.

Mr. SISISKY. You have said something that really bothered me. You said that Underwriters Laboratories may not be interested in testing a product. You mean to tell me they can exclude a product if they choose not to accept it?

Mr. FRIER. Absolutely. The Federal Trade Commission, through all their hearings, has had numerous manufacturers of products like the fire extinguisher, for example, that didn't fall into a particular performance area and, therefore, it couldn't be tested. The only way to test it is develop a new standard for it.

Mr. SISISKY. No, you mentioned that, might not have a standard for the product and may not be capable of testing the product. I can almost understand that—or may not be interested in testing.

Mr. FRIER. I will give you examples. There are certain areas where they have no capability—over 600 volts, for example. Underwriters Laboratory previously had no interest in getting into the market of testing equipment that was rated over 600 volts. It was an area they were not interested in getting into—period, we are not. However, there were some jurisdictions that were requesting labels on products over 600 volts.

Mr. SISISKY. Would you explain again—Mr. Chairman, I will just take another minute—either one of you. I assume the problem is with OSHA now. It's not with OSHA?

Mr. FRIER. It is such a complicated situation. In other words, the label is required by numerous people. Mr. Alexandres mentioned, for example, Exxon and Shell, I believe, or whomever. They are the one that require a label. OSHA is just a group that requires a particular label.

The city of Washington, DC, requires a label; however, they accept the MET label. The city of Chicago will not accept the MET label. The city of Los Angeles will not accept the MET label. So every area that has a responsibility to provide some protection, and they do have—it's not their responsibility even, it's their obligation to provide protection to their citizens—they feel that they have this discretionary power to say who was going to do the testing and, ac-

cordingly, whose products are going to enter the marketplace, and whose will not.

Mr. SISISKY. I yield back the balance of my time right now, Mr. Chairman.

Mr. BEDELL. Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I do have an opening statement, sir, and if I may, would like it to be inserted in the record, with unanimous consent. I would appreciate it.

Mr. BEDELL. Without objection, it will be entered in the record.

[The opening statement of Congressman Bilirakis follows:]

OPENING STATEMENT OF HON. MICHAEL BILIRAKIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman, I am pleased that you have called this hearing today. For the past two years, this subcommittee has spent many hours examining areas which inhibit the creation and growth of small businesses. We have closely scrutinized many Federal policies to ensure that they are not denying small business the opportunity to sell to the Federal Government.

We all appreciate the need for consumer protection through the testing of products; however, there is another facet to this and that is giving the consumer the choice of a number of different approved products. It appears that the situation before us today is multifaceted in that competition in the product testing industry may be limited and, if so, that may be hampering the efforts of small business to bring an approved product to the marketplace and to even open the door for small business to enter the product testing field without bias.

As we have all said during this Congress, if we are to see a healthy, growing economy, small business must be encouraged since that is where the jobs are.

If small business can build a better product for less money they should not be held back from marketing an acceptably tested product because of a barrier in the testing industry or Federal policies which deny them the opportunity to sell to the Government. I look forward to the testimony we will receive and, Mr. Chairman, I want to commend you for once again showing your willingness to tackle a difficult problem.

Mr. BILIRAKIS. Messrs. Alexandres, Martin, Frier, who are UL and Factory Mutual? Now, Mr. Frier's written and oral testimony is to the effect that there are nonprofit groups. What does that mean? Who are they?

Mr. FRIER. They are just private companies that—they actually—I can't think of the word. But they actually promoted, you know—the Internal Revenue law 501(c) that says, that charitable organizations, religious organizations, and then organizations that test for public safety, are nonprofit—and they got themselves rated nonprofit.

Mr. BILIRAKIS. Are these a bunch of good guys who decided that the marketplace needs testing labs and they provided it on a no-profit basis to start these organizations?

Mr. FRIER. I don't want to say they are a bunch of good guys necessarily.

Mr. BILIRAKIS. Who else is going to do work for nothing?

Mr. FRIER. You see, when you say not-for-profit—and when the Federal Trade Commission was having the hearings, I remember in 1981, you had well over $100 million cash in the bank that they called reserve. It is a legal terminology and I am not familiar with it—that they are allowed to accumulate these kinds of funds as a nonprofit organization is able to accumulate. They charge $75 an hour for some of their field technicians, and we charge $38 an

hour—and they are not-for-profit and we are for profit. So, I don't know.

Mr. MARTIN. I would like to comment on that question. Factory Mutual, unlike UL, is made up—they actually ally themselves with insurance companies. Factory Mutual Research was originally set up to test products for insurance companies who insured their clients. And the products that were tested by Factory Mutual then would be recommended by the insurance companies as products to be used in the manufacturing plants of the clients of the insurance companies. So there are many related insurance industries that use the approval of Factory Mutual as an endorsement of the products, as opposed to Underwriters Laboratories, which strictly is a testing laboratory. But they are both private companies, neither one of them have any——

Mr. BILIRAKIS. So Chairman Bedell and I can start Bedell Laboratories, or BB Laboratories, if you will?

Mr. FRIER. Sure.

Mr. BILIRAKIS. Now, the answer to that is yes, we can do this; right?

Mr. FRIER. Yes.

Mr. BILIRAKIS. And to go into business, we can call it profit or we can call it nonprofit?

Mr. FRIER. That's right.

Mr. BILIRAKIS. All right. What guidelines are we governed by? I mean, what determines whether we are qualified to conduct these tests and that the entire world, the entire marketplace, should place complete faith and confidence in our testing?

Mr. MARTIN. Factory Mutual, of course, was established by the insurance companies as a testing laboratory to test products that could be then subsequently approved by the insurance companies. But I can't answer the question for you, I don't know. UL is strictly a testing lab that has built a tremendous reputation over the years as being a protector of the consumer—that was the idea.

Mr. BILIRAKIS. These guidelines that—I believe Mr. Alexandres' testimony—they could not test our batteries as a separate entity. These guidelines require that intrinsic safety be treated as a system concept, meaning that the battery must be tested in connection with the equipment with which it will be used.

Who has determined these guidelines?

Mr. MARTIN. They did.

Mr. BILIRAKIS. They did? In other words, it is not a uniform guideline, there are testing laboratories that would test the batteries without their being part of the system concept?

Mr. FRIER. Yes, MET did, and so did CSA. We did test it.

Mr. MARTIN. Some of the laboratories—they have standards, like in the case of the fire extinguisher, both UL's 299—they have approximately a 64-page booklet that just details all of the standards that a fire extinguisher must pass in order to obtain the listing of UL. Now, if you come in with a different mousetrap, as we have, it is not pressurized, it is not metal, you either have to establish a new standard or you have to revise the existing standards in order to get the listing and approval of the laboratory.

Mr. BILIRAKIS. All right, now let's say that these standards are considered acceptable, although apparently there is no uniformity.

Mr. MARTIN. That's right.

Mr. BILIRAKIS. There is no consistency and there is no uniformity. But let's say they are considered acceptable, and let's say that the particular testing laboratory is established in the marketplace with credibility and whatnot—now, they don't test every particular unit that you manufacture, right? What do they do? Do they test one? And if they find that to be acceptable, then basically their stamp goes on every battery that you manufacture? That's correct, isn't it?

Mr. FRIER. Well, not totally, there are controls. But, certainly, the prototype is the only battery, for example, that comes into the laboratory for undergoing, you know——

Mr. BILIRAKIS. The prototype, singular?

Mr. FRIENDLICH. In the case of Alexander's batteries, we tested 20 production units and 20 units which were specifically made to prohibit the generation of more energy than would be available in the production unit. And that is basically following the guidelines that are set up in UL 913, which we used as a guideline for our test, augmented by particular tests that we felt were applicable for this product. And, again, that was with the manufacturer's understanding and free knowledge.

Mr. BILIRAKIS. All right, but if these prototypes had successfully passed the test—and these prototypes, of course, are manufactured on the basis of certain specifications, and what-not—then your own internal quality control would be responsible to be sure that future production would adhere to it; is that right?

Mr. FRIENDLICH. We perform unannounced factory inspections; we pull samples from their production line; we would break them open to see that the components were the same.

Mr. BILIRAKIS. Well, yes, the quality control.

Mr. FRIENDLICH. Our report is in the file, and you will see from examining that there are photographs and adequate descriptions of the components, and an inspector can identify the product better.

Mr. BILIRAKIS. But who is the inspector, internal?

Mr. FRIENDLICH. That's normally in our case, always us, and normally we send someone who was involved in the original testing.

Mr. BILIRAKIS. All right, but Underwriters Laboratories or Factory Mutual, there is no outside quality control—in other words, involved as far as future manufacturers are concerned, right? The only quality control is internal?

Mr. FRIER. That's correct.

Mr. BILIRAKIS. OK.

Mr. FRIER. Sir, testing is one of the only businesses for which there is really no accountability. We, or anybody, could determine what products will enter the market and which will not, just by being a recognized testing laboratory, and it could even be a particular engineer.

Mr. BILIRAKIS. But even that is just that the inception of the entire process, the prototype, if you will—the testing laboratory is no longer involved along the course of manufacture; isn't that true?

Mr. FRIER. That was, the testing laboratory maintains, the followup?

Mr. FRIENDLICH. Yes.

Mr. FRIER. Yes; we maintain control, but we have a followup service.

Mr. BILIRAKIS. Internally, you maintain control?

Mr. FRIER. No; we go to the manufacturer's facility. We do exactly what Underwriters Laboratory and Factory Mutual does, we are exactly their competitor. We test with the same exact standards they use if they are nationally recognized standards.

Mr. BILIRAKIS. All right. But then once the prototypes have been accepted and the specs have been finalized, and the production line starts to run, do you have people there periodically to check that they do follow the guidelines right?

Mr. FRIER. Yes, sir.

Mr. BILIRAKIS. All right.

Mr. FRIENDLICH. They don't know what we are pulling, obviously, we just go to a shelf and pull it.

Mr. BILIRAKIS. Yes; that's OK, that is the way it should be done.

All right, now, Mr. Alexandres, let's assume that there are 20 batteries that are used as prototypes. Could you not have purchased, or in some way had the Motorola communications equipment available to you so that you could in fact furnish Factory Mutual these 20 prototypes as a system?

Mr. ALEXANDRES. We did, submit——

Mr. BILIRAKIS. You did?

Mr. ALEXANDRES [continuing]. A Motorola radio for the——

Mr. BILIRAKIS. But did that not then meet the guidelines and they still refused the test?

Mr. ALEXANDRES. Right.

Mr. BILIRAKIS. I know that there is testimony in here about Exxon being willing to do something to—that they test our batteries with Exxon's Motorola equipment and Factory Mutual refused. They refused even at that point. So, what you are saying is that you met the guidelines?

Mr. ALEXANDRES. Yes.

Mr. BILIRAKIS. Do you think the guidelines are good guidelines, that they be tested as a system?

Mr. ALEXANDRES. Yes, that's fine.

Mr. BILIRAKIS. OK, nothing wrong with that concept.

Mr. ALEXANDRES. That's why we supplied the radio. We also supplied schematics of how it's built. As far as we are concerned, there is no other information that was proprietary. Those schematics are, you know, published.

Mr. BILIRAKIS. So, actually, then these testing laboratory concepts started probably with the insurance companies for obvious reasons, to help them out, and it now has spread to the point where actually they are stumbling blocks to competition. Was that the bottom line of everything that you are saying?

Mr. ALEXANDRES. We were told by most of the petroleum industry that Factory Mutual does the testing and they are the arm of these insurance agents, and if they changed, then they might lose their insurance. They were under a threat not to use some other product.

Mr. BILIRAKIS. You know, I can't blame Motorola for not wanting to make their equipment available.

Mr. ALEXANDRES. Neither can I.

Mr. BILIRAKIS. They are not going to invite competition, obviously. If you and I were their executives, that's commonsense.

Mr. ALEXANDRES. If I had the same situation, I might do the same thing.

Mr. BILIRAKIS. Yes, right.

Mr. ALEXANDRES. But it doesn't mean it's right.

Mr. BILIRAKIS. But the testing laboratories apparently don't.

Well, I guess that's a good question, I am suggesting here, Mr. Chairman, just one final one, and I guess we had better go—the quorum call.

What would B&B testing labs, or Bedell, Bedell testing labs, I guess would be preferable, it would be more diplomatic—but what would they have to do in order to ultimately get recognized and receive the same type of credibility, if you will, as UL and Factory Mutual?

Mr. ALEXANDRES. We were told in Canada that CSA is all we needed. But after we got approval, we found out they still wanted Factory Mutual. We are still talking the same insurance companies.

Mr. BEDELL. Will the gentleman yield?

Mr. BILIRAKIS. Yes, sir.

Mr. BEDELL. Our final witnesses are from the Federal Trade Commission—and my understanding is they would have some responsibility in this area. Am I correctly informed?

Mr. BILIRAKIS. May we be able to acquire that answer downstream somewhere, Mr. Chairman?

Mr. BEDELL. Yes.

Mr. BILIRAKIS. OK, thank you. Thank you, Mr. Chairman.

Mr. BEDELL. We have a quorum call. The subcommittee will stand in recess for about 10 or 15 minutes. We will go over as fast as we can and get back.

[Recess.]

Mr. BEDELL. The subcommittee will come to order.

Is Mr. Alexandres here?

Mr. BEDELL. Mr. Cooper.

Mr. COOPER. I have no questions right now, Mr. Chairman, thank you.

Mr. BEDELL. I think one of the major issues we need to get at is whether or not, in my opinion, the present system is restricting competition and making it impossible for people to properly compete in the marketplace.

I did, since you mentioned in your testimony, look forward a little bit to see what is in the testimony of Factory Mutual, and if I read it correctly—and a very hurried reading—they could not test your battery, Mr. Alexandres, because they did not have the drawings that they needed from Motorola. They had them, but since Motorola would not necessarily give them permission to use the drawings, it would be improper for them to use them.

Were there drawings—you said you supplied some drawings—are these the schematics they are talking about, or are there other drawings?

Mr. ALEXANDRES. Yes, we supplied—I don't know what else they could possibly want. The schematics are usually supplied when you buy the radio.

Mr. BEDELL. OK. So you supplied those to them as well as the radios?

Mr. ALEXANDRES. Right. We did it both in Canada for CSA and MET here.

Mr. BEDELL. Mr. Frier, you did test his batteries with Motorola equipment, I assume, didn't you?

Mr. FRIER. That's correct, yes, sir.

Mr. BEDELL. Where did you obtain the Motorola equipment?

Mr. FRIER. It was furnished to us by Mr. Alexandres with the batteries to test it.

Mr. BEDELL. And you offered to do the same thing for Factory Mutual, is that correct?

Mr. ALEXANDRES. Yes.

Mr. BEDELL. Did you need some drawings in addition to those he furnished you?

Mr. FRIENDLICH. What he furnished us was a complete schematic and parts list to the MX 330 radio, that is the highest power of the series of approved radios.

Mr. BEDELL. So everything, as far as you are concerned, was available publicly that you needed in order to properly test the battery; is that correct?

Mr. FRIENDLICH. Yes, sir.

Mr. SISISKY. Would the chairman yield?

Mr. BEDELL. Be glad to yield.

Mr. SISISKY. Right on that point, did your lawyers have any problem with you using the Motorola for testing?

Mr. FRIER. No, sir. We really never actually consulted them, but it is very common practice for us to test a component of an item to get the major item and just test that component.

Mr. SISISKY. Without permission of the manufacturer?

Mr. BEDELL. Without permission.

Mr. FRIER. Right, we never seek permission.

Mr. SISISKY. Thank you.

Mr. BEDELL. Have you ever been challenged legally?

Mr. FRIER. No, sir, never.

Mr. BEDELL. In addition to that, my understanding is that since you are not registered or certified to be one of these accepted testing laboratories, it somewhat restricts the amount of business that you can obtain. Is that correct?

Mr. FRIER. Yes, sir, definitely.

Mr. BEDELL. OK. I think the question Mr. Bilirakis was asking is, what is it that prevents you from getting that certification? I thought that our last witness was going to be able to help us on that, and I want to be sure that I am not bypassing this.

Is it correct that if the Federal Trade Commission would have a mind to do so, they could help you to get where you would be able to compete better with Factory Mutual and Underwriters Laboratory, or is that incorrect?

Mr. FRIER. No, sir, that's correct. If the rule, as recommended by the staff, would have been adopted by the Federal Trade Commission, we would have been a significant electrical testing laboratory in the United States today.

Mr. BEDELL. So, it was recommended by the staff of the Federal Trade Commission, according to your understanding, that you be certified?

Mr. FRIER. The Federal Trade Commission would not have certified anyone; all they would have done would to have made it a violation—I don't know how you call it—the violation of the law, if somebody refuses to accept the services of another laboratory in some way. That is not the exact wording, but it would have had that effect.

Mr. BEDELL. I don't understand what you are saying.

Mr. FRIER. In other words, for the purposes of being anticompetitive, a person couldn't say, UL only, or Factory Mutual only. That would be an antitrust action by someone, or words to that effect. The Federal Trade Commission would have to tell you how the final rule was initially submitted for adoption by the committee. But it wasn't adopted, it was just recommended against it.

Mr. BEDELL. So it is your understanding that the staff of the Federal Trade Commission recommended that they adopt a rule which would have created more competition among testing laboratories, and the Commission itself rejected such a proposal; is that correct?

Mr. FRIER. That is absolutely correct.

Mr. BILIRAKIS. Would the chairman yield?

Mr. BEDELL. Be glad to.

Mr. BILIRAKIS. When did that take place?

Mr. FRIER. 1983, the rule was published.

Mr. BILIRAKIS. But when was the recommendation made?

Mr. FRIER. Well, the rule was never adopted, they recommended against it.

Mr. BEDELL. When did the staff recommend it, do you know that?

Mr. BILIRAKIS. When did the staff recommend, or make this recommendation to which you have just referred?

Mr. FRIER. I would rather that the Federal Trade Commission answer. I don't really know the dates on that.

Mr. BILIRAKIS. All right, but, sir, has the Federal Trade Commission, in some way, done or said something which has placed UL and Factory Mutual in this very controlling, apparently controlling, position?

Mr. FRIER. No, the problem is that the Federal Trade Commission didn't do anything.

Mr. BILIRAKIS. All right, but the Federal Trade Commission is not really responsible for it having taken place. What you are saying is that since it is restraint of trade and noncompetition and that sort of thing, the FTC should get involved. But they haven't done anything, you know of, in a positive manner to cause that to take place?

Mr. FRIER. That is correct.

Mr. BEDELL. But my understanding from his testimony is that the staff recommended that they take action which would have corrected it.

Mr. BILIRAKIS. Right.

Mr. BEDELL. And the Commission voted against such action, is that correct?

Mr. FRIER. That's correct.

Mr. BILIRAKIS. But we don't really know exactly when that has happened.

Mr. BEDELL. Not exactly, but was it 1982, 1983, is that correct?

Mr. BILIRAKIS. Yes.

Mr. FRIER. Right before, that's what caused us to file suit against OSHA.

Mr. BEDELL. So you filed suit, too?

Mr. FRIER. We are the ones that sued OSHA.

Mr. BEDELL. Oh. We've got some lawyers on this panel and we are finding out there is a lot of business for lawyers.

Mr. FRIER. Well, you know, it is very frustrating, like Mr. Alexandres is mentioning, and other people are mentioning, it is very frustrating, that there is no place to go but to the courts. I started with OSHA in 1972 when they recognized there was a problem, that it was impossible to provide our services in a marketplace. OSHA was supposed to do something. We thought they would. In 1976 and 1977, I testified before the Senate, which had two bills moved from one committee to the next; and the next session, nothing occurred. In 1977, the Federal Trade Commission took up the cause; and then after a while you get so frustrated, you say, you either are going to get out of this business or you are going to resort to the courts, and that is exactly what we did.

Mr. SISISKY. Would the chairman yield right at this point?

Mr. BEDELL. Be glad to yield.

Mr. SISISKY. Who certifies the testing laboratories? Isn't that the question, really, because an engineer could set up and say I am a testing laboratory?

Mr. FRIER. Absolutely.

Mr. SISISKY. Well, who certifies the testing laboratory?

Mr. FRIER. Nobody, absolutely nobody.

Mr. SISISKY. Nobody certifies the testing laboratory?

Mr. FRIER. Sir, we have power—I mean, we, as I say, as a testing laboratory, to say what products get on the market, what products don't. We also have the power to say to a manufacturer, how much he is to charge, or how much he is to pay us; he has no recourse. We could tell him how to modify his product and how to sell it. If we were friends with one manufacturer of a product, if we wanted to, and were unscrupulous, we could prevent him from having any competition on this product for a long period of time, if we wanted to.

There are so many things, and there is absolutely no accountability. There is nobody there to report to. There are numerous lawsuits relative to standards, giving products no accountability to anybody.

Mr. SISISKY. The manufacturer would have the right to go shopping then. In other words, if you turn his product down, he could go to another testing laboratory. I would assume that's why—and I am just thinking out loud—that you have a UL and a Factory Mutual. Somebody has said, whether it be insurance companies or somebody else, that these are the reputable—and I don't mean that you are not reputable—these are the people that we can depend on.

Would that be a fair assumption? Maybe we need somebody to certify testing laboratories.

Mr. FRIER. OK, they have said it, but nobody has said that these are the people that we can depend on. They just said these are laboratories.

For example, OSHA, by inference, recognizes UL and Factory Mutual. And because they had them mentioned in the regulations, they automatically were nationally recognized. OSHA has never, ever, visited UL or Factory Mutual facilities to determine their competency or their capabilities, not once.

Mr. SISISKY. Are you sure of that now?

Mr. FRIER. I am absolutely positive, because we have been through litigation with OSHA. They have never, in a technical nature, visited OSHA to determine whether they had equipment, whether they had engineers, whether they had any kind of ability at all. They have never made any judgment as to their technical competence.

However, they know for a fact that they are good. And I will be the first to admit that UL and Factory Mutual has done a very good job in this country to maintain qualified, safe, and responsible products in the marketplace, and they prevent a lot of actions.

However, there are a lot of abuses to that also. And there are other people that also have the same abilities that just should have the opportunity to make other innovative manufacturers accessible to the marketplace. And we are the ones that could probably do that for them. However, when there is nobody to submit an application to, what do you do?

OSHA issued a testing laboratories accreditation regulation which was published in the Federal Register September 11, 1973 as a rule. We submitted an application, and it died. And there are other laboratories that also submitted applications. They never got any further than that because OSHA never promulgated that regulation until we filed suit against them in 1983 after the Federal Trade Commission deferred any action.

Mr. SISISKY. Thank you.

Mr. BEDELL. Let me read to you from the Federal Register of Friday, January 16, 1981:

> Electrical Standards, OSHA, it is stated: Labeling refers to the label of a nationally recognized testing laboratory such as Underwriters Laboratory, Inc., or Factory Mutual Engineering Corporation, which indicates that the equipment in question has met criteria set by that laboratory for electrical safety. If equipment is required by the subpart to be approved, the equipment which is labeled is acceptable to OSHA.

So that, really, the Federal Government is—OSHA is saying that it has to be approved by Factory Mutual or Underwriters Laboratories, if I read this correctly.

Mr. Alexandres, approved—you tried to have your battery tested two places for approval the Mine Safety and Health Administration and Factory Mutual, did you not?

Mr. ALEXANDRES. Yes.

Mr. BEDELL. If Mine Safety and Health had approved it, would that have taken care of your concerns?

Mr. ALEXANDRES. I still needed Factory Mutual.

Mr. BEDELL. So, in effect, there was only one testing laboratory from which you had to get approval?

Mr. ALEXANDRES. Right.

Mr. BEDELL. Underwriters Laboratory was not something that would have fit in there?

Mr. ALEXANDRES. The mines are a market too, and we probably could have got those with the Mine Safety.

Mr. BEDELL. But you could not, in effect—because Mr. Sisisky is mentioning they probably felt they had to have two competitors. But the reality is in your case there were not two competitors?

Mr. ALEXANDRES. Right.

Mr. BEDELL. There was only one, Factory Mutual; is that correct?

Mr. ALEXANDRES. For us to get the major portion of it.

Mr. FRIENDLICH. To explain a little further what Mr. Alexandres is referring to—in the mines, only the Mine Safety and Health Administration seal is acceptable.

Mr. BEDELL. So there is only one there, too?

Mr. FRIENDLICH. There is only one for the mine applications. If you go into the oil fields, the Mine Safety and Health Administration is not acceptable, only Factory Mutual.

Mr. BEDELL. So the reality is there is not really competition among those testing laboratories. If you are turned down by one, you are out of luck for that market. Is that correct?

Mr. FRIENDLICH. Yes, sir.

Mr. BILIRAKIS. Would the chairman yield?

Mr. BEDELL. Be glad to.

Mr. BILIRAKIS. Factory Mutual was, based on previous testimony, organized by the insurance companies, for very good reasons. So the insurance companies have apparently built up such an element of credibility and confidence in them, I guess, that they will only insure if Factory Mutual actually does the certification; is that correct? Or is maybe a latter part of what I have just said correct, the fact that they would only insure if Factory Mutual does the certification?

Mr. FRIER. I don't know that to be a fact.

Mr. BILIRAKIS. You don't know that to be a fact?

Mr. MARTIN. Factory Mutual publishes a booklet of approved products which they distribute to all of their insurance companies as well as approximately 30,000 other organizations in the United States.

Mr. BILIRAKIS. Have we run into cases where an insurance company or insurance companies would refuse to insure, or maybe the premiums would be exorbitantly higher if someone other than Factory Mutual certified?

Mr. MARTIN. I don't have that evidence but I suspect it is so.

Mr. BEDELL. Excuse me. Do any of you know that answer?

Mr. ALEXANDRES. Not as a fact, I don't. It has just been reported that way to us.

Mr. BILIRAKIS. You know, Mr. Chairman, page 3 of Mr. Frier's testimony indicates public hearings were held in 1979, and a final staff report was published in April 1983. Four years later, apparently, although the staff recommended a rule, the Commission disagreed, that was referred to.

Mr. ALEXANDRES. Yes.

Mr. BILIRAKIS [continuing]. The staff coming up with a final report after the hearings terminated?

It comes down to the Federal Government again, I think.

Mr. BEDELL. Rates on Alaska Pipeline have been pending, I think, for 6 or 7 years now.

Mr. Alexandres, you mentioned to me earlier about your problem with qualified products lists. The reason I bring that up it is a matter of particular interest to myself and I think some of the other members of our committee.

Would you repeat what you told me about your situation on trying to sell your batteries to the Federal Government and the qualified products list problem that you had? Well, you said that somebody got on it 20 years ago, were they qualified on——

Mr. ALEXANDRES. We do some bidding for Government batteries, and if it is the first time you have bid on this product, they insist on first article testing. In some cases, the original product never could have passed that testing either, and normally we can't either. So we are disqualified on products that couldn't pass those tests on the best day.

Mr. BEDELL. And they are buying products, in your opinion, that clearly could not pass the test?

Mr. ALEXANDRES. No, the first——

Mr. BEDELL. If I understood you, they were approved 20 years ago.

Mr. ALEXANDRES. The first article specifications were way out of line in all three cases we got involved in. Then they won't accept your product, or they have to change the specs.

Mr. BEDELL. And if I understood you correctly, it was some long time ago that those original products were approved?

Mr. ALEXANDRES. Yes.

Mr. BEDELL. Do you know how long?

Mr. ALEXANDRES. It was at least 20 years.

Mr. BEDELL. I thought the committee would be interested in that.

Mr. COOPER. I don't fully understand that.

Mr. ALEXANDRES. Well, they have first article testing, which is specifications that were originally drawn up for any product that the Government buys. Now, usually the original manufacturer meets those, and in some cases there is no possible way they could have met those specifications. They write them in to keep everybody else out.

Mr. COOPER. So the manufacturer 20 years ago would have made a super version of a given product?

Mr. ALEXANDRES. In plain light, that's all there is to it.

Mr. BEDELL. Excuse me. Mr. Sisisky?

Mr. SISISKY. I just had a case with the Department of Defense. A manufacturer, in my district, was manufacturing parts for ships, he was frozen out by the DLA—the Navy had been buying for a good length of time. DLA does have testing facilities, and I have met with them now they have agreed to send all of the district manufacturers equipment to a testing laboratory in Long Island—I don't know what it is. Now the equipment is approved every week, a variety of items. I know there is a procedure that works.

Mr. BEDELL. But his problem is somewhat different in that he would need to ask them to test the products that they are buying. He agrees that his products cannot meet the requirements, but his claim is the products they are buying do not meet the requirements either.

Mr. ALEXANDRES. Right.

Mr. BEDELL. And that his are as what good as they are buying.

Mr. SISISKY. It begs the question why couldn't your products meet the testing? The testing is too severe?

Mr. ALEXANDRES. Right. The product wouldn't have met those specs.

Mr. BEDELL. No products would, if I understand.

Mr. ALEXANDRES. No, nothing could be done to make them meet those specs.

Mr. BEDELL. Of any product?

Mr. ALEXANDRES. Right. The original manufacturer lied or cheated to get those passed.

Mr. SISISKY. I would say, if you would leave with this committee the product—I mean, you are making a logical point there—I think we could check that out.

Mr. BEDELL. Sure. We can require it to be tested, I think—we could probably do something. We have been successful in some areas.

Mr. COOPER. Any easily understood aspects of a product, do they require that a battery be 12 volts, and really every battery only produces 9 volts?

Mr. ALEXANDRES. In this particular case it was supposed to work at 20 below, I believe, and that particular battery couldn't work at zero—but we were supposed to pass that test. Well, the original cells were made by Mallory—and 20 years ago they couldn't pass, and today they can't pass.

Mr. COOPER. In other words, no battery could pass the 20-below test?

Mr. BEDELL. That type of battery.

Mr. ALEXANDRES. Yes, that type of battery.

Mr. BEDELL. It's in those specs.

Are there any further questions? If not, we want to thank you all for your testimony. We would appreciate it if you would stay around, we may have some further questions later. Thank you.

Our next panel consists of Mr. William Reed, counsel for Factory Mutual Research, Norwood, MA, and Mr. Thomas Shepich, Deputy Assistant Secretary of Mine Safety and Health Administration.

Mr. Reed, we will start with you. We do have your testimony, and any summarizing that you could do would be appreciated by the subcommittee.

TESTIMONY OF WILLIAM REED, COUNSEL, FACTORY MUTUAL RESEARCH CORP., ACCOMPANIED BY JOHN RENNIE, ASSISTANT VICE PRESIDENT

Mr. REED. Thank you, Mr. Chairman. I do realize the length of the statement precludes our reading it at this time, and I am prepared to summarize the significant points.

With me this morning is Mr. John Rennie, seated to my left, who is the assistant vice president for Factory Mutual Research Corp., and is the assistant manager of the approvals division.

Factory Mutual Research Corp. is, as you have heard this morning, a nonprofit organization, and in all honesty, has nothing to gain by showing favoritism toward one particular client as against

another. There is no incentive to us to act discriminatorily or to give one manufacturer an uncompetitive advantage over another competitor. In fact, because independence is imperative in our business, we have in fact, everything to lose.

We are involved in product testing and certification because of concern for property conservation. Our mission is to find ways to prevent property losses from occurring.

We have established product testing criteria which we believe are rational and necessary from a technological standpoint, and these cannot be arbitrarily altered or abandoned. At the same time, however, we do recognize that those standards must be dynamic and flexible to developing technology.

In undertaking to do this kind of testing, Factory Mutual Research Corp. is contractually, as well as under common law, obligated not to disclose proprietary information or trade secrets. Proprietariness is apparent from the fact that in this particular case the Motorola equipment has one or more patents which are applicable.

It should be noted that because we approach all clients in an equitable, nondiscriminatory fashion, this policy works to the advantage and disadvantage equally of all clients, small and large alike.

Another factor to keep in mind is that where certification or approval is granted initially, continuing approval of battery packs such as those manufactured by Alexander, makes it imperative that a relationship be established with the radio manufacturer. If revisions are made in the radio, the battery similarly may need to be altered, and only through communication with the radio manufacturer will the battery manufacturer be able to be efficiently apprised of such changes.

This subcommittee should also consider that it was purely coincidental that Factory Mutual Research had the Motorola data in its possession. More typically, the testing organization will not have possession of the necessary data, and under such circumstances is totally at a loss to come to the client's assistance.

To effectively deal with the Alexander type problem, even assuming there is a legally appropriate remedy, it should be approached by this subcommittee from the context that the testing organization is not at liberty or able to provide assistance to the client by using data or other information submitted to us by another client.

I am led to believe that this subcommittee may not be aware of the fact that there is pending in the Federal District Court in the State of California litigation against Factory Mutual Research by a competitor of Alexander Manufacturing in a dispute which is on all fours identical to the matter at issue before the subcommittee this morning.

The complaint submitted by that particular entity was dismissed by the court on a motion to dismiss because of the failure of the plaintiff to state a claim upon which relief could be granted. The court specifically—and we can provide the subcommittee with a copy of the memorandum of opinion written by the court in that case—has concluded that there is no obligation on the part of Factory Mutual under those circumstances to have used the Motorola data for the benefit of that particular client.

We were unaware that the Nu Fire Products situation would be an issue which would also be discussed at this hearing today. As Mr. Sisisky pointed out before, it may not be in the best interests of both parties involved to discuss pending litigation in any great detail.

We are prepared to answer any questions that this subcommittee may have, and Mr. Rennie can provide you with any technical assistance that may be required.

[Mr. Reed's prepared statement follows:]

PREPARED STATEMENT OF WILLIAM REED, COUNSEL, FACTORY MUTUAL RESEARCH CORP.

Factory Mutual Research Corporation at the outset wants to take this opportunity to thank the Subcommittee on General Oversight and the Economy for allowing its representatives to participate in this hearing. We are cognizant of the difficulties Alexander Manufacturing Company has encountered in having its battery tested for purposes of determining its suitability for hazardous location applications. Factory Mutual is fully prepared to discuss this situation in particular and the overall problem in general as it relates to the desire and need for any business to compete equitably in the marketplace.

In order to assist the Subcommittee in its investigation and deliberations regarding this matter, it might be appropriate to provide you with some perspective into what Factory Mutual Research is all about. Under the criteria enumerated within the Code of Federal Regulation, Factory Mutual Research Corporation is, itself, a small business entity. It is engaged in a variety of research, development and testing activities principally related to property conservation and loss prevention. Factory Mutual publishes the results of such research both in technical reports and in the form of loss prevention data sheets, both of which are available to public authorities. The findings of such research are also made available to national standards-making organizations such as NFPA, ASTM and ASME to further the development of loss control standards. Our Approvals Division is charged with the responsibility of conducting tests and audit inspections on a contractual basis relating to the approval of devices, building materials and services. Newly submitted items are tested and examined and must satisfy the performance criteria of the Approvals

Division. The Factory Mutual Approval mark is widely recognized in industry and is regarded as assurance that the approved item has met our necessary standards. In many cases, manufacturers rely on Factory Mutual's testing and research experience to help develop effective, up-to-date loss control products. At present, Factory Mutual Research Corporation has approximately 1500 clients for whom we approve more than 25,000 products and services.

Consistent with our commitment to advancing loss control knowledge is a responsibility to develop adequate standards for purposes of minimizing the potential of loss and, further, to insure that the products which are approved by us do, in fact, meet those standards. Approval standards issued by Factory Mutual Research contain the technical criteria for the approval of products or services. The standard is written to provide manufacturers, users, regulatory authorities, Factory Mutual personnel and other interested parties with a description of the technical conditions under which approval may be granted. Standards are developed through research, review of technical literature and consultation with manufacturers, users and others. A draft standard is prepared and submitted for review within Factory Mutual Research. Subsequently, a revised draft is prepared and forwarded for industry review and comment. In the case of our intrinsic safety standard, it was submitted to more than 100 companies for their review. This Factory Mutual standard very closely parallels the U. S. national standard on the subject. As a matter of fact, Factory Mutual assisted in drafting the national standard which through the American National Standards Institute (ANSI) was adopted as a national consensus standard. The standard carries an ANSI reference of 4913 and literally hundreds of firms and individuals were afforded the opportunity to review and comment.

It might be appropriate at this juncture to point out that Factory Mutual Research has been of assistance to small businesses engaged in a variety of enterprises. In fact, the research and testing undertaken by us has led to the development of many new products, and our approval of those products has significantly enhanced their marketability. This Subcommittee might be interested to know that the very first intrinsic safety approval granted by Factory Mutual,

more than 20 years ago, was to an organization in Boston so small that the inventor/owner assembled the product in the basement of his home.

Factory Mutual, as may be commonly recognized, is one of the two principal testing and certification organizations in the United States for smoke detectors. Our very first approval of an ionization-type device was for a Colorado company which at the time of our first inspection for approval purposes was located in a building which had no more than 3,000 sq. ft., and the firm employed only 18 people, some on a part-time basis. A few years later, Factory Mutual granted the first approval in the United States for a residential smoke alarm to this same company. The company founder and president that year was named Small Businessman of the Year, in recognition of his contributions to household fire safety.

We regard Factory Mutual Approval as having been instrumental in the development and growth of this particular enterprise as well as many others. Interestingly, we have been fortunate enough to find that it is a two-way street. Since 1959, one small organization in Texas has operated a Factory Mutual Approved Central Station Service (a specialized, high-quality alarm service). It also markets a line of Factory Mutual Approved products. Because of the cooperative relationship that had been established between the two organizations, the owner of this firm came to our assistance in having the Factory Mutual Approval designation accepted by the Texas Board of Insurance. Clearly, this demonstrates what can be accomplished when the parties work together. We also like to think that it clearly illustrates the high mutual regard that exists between small businesses and Factory Mutual.

In respect to the matter at issue, the circumstances and events surrounding attempts by Alexander Manufacturing Company to have its battery tested for intrinsic safety are at the same time both relatively straightforward and complex. As this Subcommittee is no doubt aware, Alexander Manufacturing Company is in the business of manufacturing, among other things, batteries for use in portable communication equipment, such as that manufactured by Motorola, Inc.

Prospective purchasers of this communication equipment may require that it be tested and certified as "intrinsically safe". This designation simply means that the equipment can be used in hazardous areas as defined by the National Electrical Code. Factory Mutual Research Corporation does provide such testing and certification.

From a technical standpoint, it is important to recognize that, realistically, the only practical way to test these batteries for this purpose is to do so in conjunction with the communication equipment itself. Testing of the batteries without testing the equipment will not satisfactorily determine whether the combined assembly, i.e., the battery and the communication equipment, can be safely used in hazardous environments. For purposes of conducting a competent examination of the batteries in conjunction with the equipment, it is essential that the tester have available detailed circuit diagrams and engineering data for the equipment in which the battery is to be used.

Alexander Manufacturing Company first inquired of Factory Mutual Research in May 1975 as to whether or not we could or would undertake to perform such testing. At that time, we informed the Alexander representative that we would certainly be willing to perform the test but that, in order to do so, Alexander would need to obtain the required data from Motorola.

Nothing further was heard from Alexander until sometime in 1980 or 1981 when another inquiry was made by Alexander regarding our performing these tests at which time we communicated the same previously-stated criteria.

Again, there was an absence of communication from Alexander until we received a letter dated May 27, 1983 wherein we were similarly requested to provide Alexander with advice regarding what information would be required in order to undertake the testing of four particular batteries, along with an estimate of cost and time for completion of the testing program. Following a series of telephone conversations between our Mr. R. L. Martell, Jr. and Mr. Peter Benson of Alexander Manufacturing Company, Mr. Martell, under letter dated September 8,

1983 restated our policy requiring that Alexander communicate with Motorola to obtain its cooperation in providing us with the information needed for performing the tests.

One of the complicating factors involved in this particular situation is the fact that Motorola itself is also a client of Factory Mutual Research Corporation. In fact, Factory Mutual has tested and approved the Motorola portable communication equipment in which Alexander intends its batteries to be used. Motorola also manufactures a line of batteries itself for use in its own equipment, and to that extent is potentially a competitor of Alexander. In testing the Motorola equipment for intrinsic safety, we also tested the Motorola battery. Consistent with the policy expressed to Alexander, we required from Motorola, at the time those tests were undertaken, complete technical information as respects both the equipment and the battery. At the time, therefore, that Alexander Manufacturing requested our testing of its battery, we already had in our files the data which we requested Alexander obtain from Motorola.

It should, however, be obvious that the Motorola data is proprietary in nature since it contains what must be regarded as trade secrets. As a matter of common law, there is an implied obligation upon the recipient of such trade secrets or similar confidential information not to use it except as expressly authorized. When the data was provided to Factory Mutual by Motorola, there was a clear intent and understanding that Factory Mutual would preserve its confidentiality. Under no circumstances, except by court order, was Factory Mutual authorized or at liberty to disseminate that information to some third party or even use that information for the benefit of another. It is our corporate policy, to which we strictly adhere, that any information provided to us by a client relative to product testing will be kept privileged and confidential. We are, under the terms of our Proposal and Service Agreement with each client, authorized to use such information for our own internal use in furthering loss control technology in general, but this certainly would not extend to utilizing such data for purposes of examining the product of another. To do otherwise would expose Factory Mutual and others similarly situated, in virtual-

ly any business context, to liability to the original provider of the information for breach of fiduciary responsibility, misappropriation of trade secrets and invasion of privacy. The problem would be further magnified where the product originally tested was patented.

In the Alexander situation, in all candor, Factory Mutual Research found itself "on the horns of a dilemma". While we did in fact have physical possession of the information we were requesting from Alexander, it was not available to us for use in testing the Alexander battery. Even if arguably we could have "internally" used the Motorola-supplied data to test the Alexander battery, it seems reasonable to assume that Alexander would have demanded access to that information, especially if the Alexander battery failed in the testing. Obviously, this would have further aggravated the situation. Although we have never expressly been informed of this, we surmise that Alexander would have had a difficult time in obtaining the required data directly from Motorola in view of their possible competitive relationship. While Factory Mutual is very much sympathetic with the difficulty in which Alexander found itself, there was absolutely nothing which we could do to alleviate the problem.

Consider, further, for a moment the situation Alexander would have been confronted with had Motorola not been a client of Factory Mutual or, more specifically, had Factory Mutual not had possession of the required data. We would have had no opportunity whatsoever to assist Alexander in its quest to secure what was needed for performing the tests. The fact that we did have the information was purely coincidental and certainly an exceptional situation. Obviously, then, the dilemma is not resolved in the vast majority of cases by compelling the testing organization to do something which in the rare case will expose it to civil and criminal liability. It is additionally within the realm of probability that the originator of the data, when it recognizes the possibility that a competitor will attempt to utilize the information for its own purposes, will simply demand that we return it and retain nothing within our files. From a technology development standpoint, that is not a desirable alternative, but it is one from which we and Alexander would have no recourse.

In reviewing this situation, Factory Mutual Research Corporation strongly urges the Subcommittee to keep two factors in mind. First of all, based upon our expertise in this particular field, we have established standards and criteria by which products such as the Alexander battery need to be tested for purposes of determining their intrinsic safety. In this particular case, the most technically practical way for testing the Alexander battery is to do so in conjunction with the Motorola portable communication equipment with which it is intended to be used. In order to do that, we would need to have available sufficient technical information and data as it relates to both products.

Secondly, in our view, it is a matter of sound business prudence, if not legal obligation, to maintain confidentiality as respects information provided by clients, especially where the very nature of the information is such that it is regarded by its author as proprietary or a trade secret. In this regard, we wish to point out that such a policy also serves to protect a small business' proprietary interests should a situation like Alexander occur in reverse.

Factory Mutual Research Corporation is willing to assist this Subcommittee in finding a reasonable, workable and, of course, legal approach to helping small businesses overcome such difficulties, while at the same time taking recognition of the rights and privileges of all parties concerned.

Mr. BEDELL. I want to just thank you very, very much for the fact that you summarized your testimony. I think you hit the relevant issues and I think the subcommittee is deeply grateful to you for your cooperation in that regard, Mr. Reed.

We will now hear from Mr. Shepich.

TESTIMONY OF THOMAS J. SHEPICH, DEPUTY ASSISTANT SECRETARY FOR MINE SAFETY AND HEALTH, MINE SAFETY AND HEALTH ADMINISTRATION, ACCOMPANIED BY ROBERT MARSHALL, CHIEF, DIVISION OF ELECTRICAL SAFETY

Mr. SHEPICH. Thank you, Mr. Chairman.

Realizing that your time is running short, I, nevertheless, with your permission, would like to read my statement. I think it has relevance to the issues at hand as it relates to mine safety and health.

Mr. BEDELL. You may proceed.

Mr. SHEPICH. Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to testify on the subject of product standards and their impact on small business. I would like to briefly outline the Mine Safety and Health Administration's authorities and responsibilities and the purpose of the approval and certification function. I would like to then turn to my colleagues Mr. Robert Dalzell, Chief of the Approval and Certification Center; Mr. Robert Marshall, Chief of the Division of Electrical Safety, to discuss in more detail the approval and certification process.

By way of background, I believe it is important to note that MSHA's history dates back to 1910—a year in which more than

3,000 coal miners were killed—when the Bureau of Mines, our predecessor agency, was created. At that time, the primary purpose of the agency was to conduct research to help find causes of the accidents and injuries that were occurring in the Nation's coal mines. In the years that followed, although the rates declined somewhat, they remained high. During the 1920 to 1930 period, for example, the average number of miners killed per year was about 2,300, and during the depression years of 1930 to 1940, the average was about 1,250. As a result, in 1941, Congress enacted Public Law 77-49, the legislation which first empowered Federal inspectors to enter mines to make investigations.

In 1952, Congress passed the Federal Coal Mine Safety Act, which gave Federal inspectors the authority to issue notices of violation and orders of withdrawal.

During the period 1950 to 1960, the average annual number of coal mine fatalities fell to about 450. The law, however, exempted coal mines employing less than 15 miners. The exemption was eliminated by the Congress in 1966 following a series of accidents in those coal mines.

During the 1960 to 1970 period, the annual number of coal mine fatalities dropped to about 250, representing a decrease of about 45 percent from the previous decade.

In the late 1960's, Congress was reviewing the Coal Mine Safety Act, as amended, when a devastating mine explosion in West Virginia claimed the lives of 78 miners. On December 30, 1969, the Federal Coal Mine Safety and Health Act of 1969 was signed into law.

MSHA's current authority, the Federal Mine Safety and Health Act of 1977, which I will refer to as the Mine Act, is based largely on the 1969 Coal Act. It brought all mining operations—coal and metal/nonmetal—under a single statute and authorized MSHA to conduct inspections and investigations, as well as education and training and technical support activities. In our view, the Mine Act contains the basic ingredients for a successful safety and health program for the almost 20,000 mining operations in the Nation. In fact, the lowest number of fatalities ever occurred in 1983 in both coal and metal/nonmetal mining.

Each succeeding Mine Safety and Health law enacted has been designed to give the men and women who work in the mines protection against an often hostile environment and to assure that the Federal sector had sufficient authority and responsibility to reduce the number of accidents and injuries occurring in the mines.

MSHA, of course, does not attribute the achievements made in the safety and health conditions for the Nation's miners solely to our efforts. We realize the significant efforts made by all segments of the mining industry—including equipment manufacturers—and recognize that continued improvements also must come about through the dedicated efforts of all parties involved. I would now like to turn to a discussion of MSHA's technical support activities, of which the approval and certification program is a part.

MSHA's technical support activities have been an integral part of our mission for several decades. In very general terms, they provide the mining industry with engineering and technological assistance, they collect and analyze data on accidents and injuries, they

conduct numerous laboratory investigations, they make onsite mine hazard evaluations and, as you are aware, they approve certain types of mining equipment, instruments, and systems for use in underground coal mines. The purpose of each of these activities is to assure that the working environment is as safe as possible for the miners.

The approval and certification function is one of the oldest in MSHA—in fact, in some cases it predates our enforcement activities. It is also, in my view, a critical aspect of MSHA's overall mission that has contributed substantially to the progress that has been made in safety and health over the years. The basic purpose of the Approval and Certification Center is to evaluate certain types of equipment to assure that the equipment, when used in underground coal mines, will not cause a mine fire or explosion.

The types of equipment of systems approved by our Approval and Certification Center range from large mining machines to electric cap lamps, from explosive devices to telephone communication systems. The kinds of products we approve are set forth in MSHA's approval regulations found in parts 11 through 36 of title 30 of the Code of Federal Regulations. These regulations also contain specific design, construction, and test requirements which manufacturers must meet in order for their products to be approved.

Once an approval is granted, the approval holder is obligated to manufacture the product in accordance with the approved drawings and specifications. Any size or type of manufacturer can request testing and approval of its equipment or system. An approval will be granted as long as the requirements of the regulations are met.

As you may be aware, except where provided by our regulations, MSHA tests and approves total systems rather than the individual parts which make up the systems. This is because it is systems or products, and not individual parts standing alone, which are used underground in the mining process and MSHA's responsibility is to assure that the system or product as assembled and used is safe and will not cause an ignition. This systems approach to the approval of equipment, which is applied uniformly to both large and small manufacturers alike, has been a major element of our approval program since its inception and, we believe, has served to enhance safety in the mines. This is demonstrated by the fact that since the Federal Government has been involved in this activity—which in some cases dates back to the 1930's—to our knowledge, no approved piece of equipment or system manufactured in accordance with the specifications and properly maintained has caused an explosion in an underground gassy mine.

Aside from the complex questions that are raised by revising this approach, including the impact on existing approval holders, the impact of changes on the purpose of the overall program must be considered.

If we were to approve individual parts which our current regulations generally prohibit, the danger exists that a component could be used in a device in a way not contemplated nor tested for its safety, thus creating the possibility of an ignition. Therefore, in our view, an individual parts approval program would not assure the same degree of safety provided by the systems approach.

Finally, I would like to note that MSHA is particularly sensitive to the impact our regulations have on small businesses. Recently, MSHA has undertaken a regulatory review project. In order to ensure that all affected businesses have an opportunity to participate in the rulemaking process, we have initiated several steps. We, for example, mail Federal Register notices directly to businesses that the draft or the proposed rule may affect. We also alert trade associations of any published Federal Register documents that may affect their membership, many of which are small businesses. And, to ensure widest possible notification, press releases are prepared which are sent to newspapers published in areas of intensive mining activity. Lastly, as a general practice, MSHA holds public conferences at the preproposal stage, and public hearings after a rule has been proposed. These conferences and hearings are specifically located where there are heavy concentrations of affected businesses. We believe these steps are essential to assure active and meaningful participation in our rulemaking process by small businesses.

In summary, MSHA recognizes the impact a regulatory agency can have on businesses. We, therefore, attempt to administer our programs effectively, recognizing that the mining industry is considered one of the most hazardous in the Nation, without being unnecessarily onerous.

I now would like to ask Mr. Dalzell and Mr. Marshall to join me to discuss in more detail the approval process. And after that we would be happy to answer any questions you may have.

Thank you.

Mr. BEDELL. We have a short statement here from Mr. Dalzell. Does Mr. Marshall have a statement too?

Mr. MARSHALL. No, I don't.

Mr. BEDELL. OK. You may proceed, Mr. Dalzell.

TESTIMONY OF ROBERT W. DALZELL, CHIEF, APPROVAL AND CERTIFICATION CENTER FOR MINE SAFETY AND HEALTH, MINE SAFETY AND HEALTH ADMINISTRATION

Mr. DALZELL. Thank you, sir.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear before you today. I would like to briefly outline the approval and certification history and process for you and then would be happy to answer any questions that you may have.

The approval and certification function, as Mr. Shepich indicated, dates back to 1911, when the first regulations, then called schedules, were issued for the investigation of electrical equipment.

However, until enactment of the 1952 Coal Mine Safety Act, requirements for the use of approved equipment in underground coal mines could not be enforced.

Over the years, with the advent of new mining technologies, as well as better understanding of the hazards involved in underground coal mining, the number and types of equipment subject to MSHA's approval process grew. The fundamental elements of the approval process, however, have remained unchanged.

To obtain approval for any product, a written application is submitted to the A&CC accompanied by drawings, specifications, quality control data, and written descriptions as appropriate. Each application is forwarded to the function within the Approval and Certification Center that is responsible for conducting the engineering investigation of the product for which the approval is sought.

For example, telephone communication units are forwarded to the Division of Electrical Safety, whereas, diesel powered transportation equipment is forwarded to the Division of Materials and Machine Safety.

Each application received is evaluated in turn by a specialist in the field to assure that the design criteria contained in the regulations have been met.

This is accomplished through extensive engineering investigations, analyses, and evaluations of the drawings and specifications submitted. At this stage, a determination of whether inspection and/or testing of the product or system is made.

Upon completion of the examinations, tests, inspections, and analyses, assuming that all the criteria are successfully met, the applicant is issued an approval letter. Contained within that letter is a listing of the drawings, specifications, and related material upon which the approval is based, and which must be exactly adhered to in the manufacturing of that equipment or the system.

In order to assure the quality of manufactured approved equipment, the manufacturer is obligated to submit documentation of quality control procedures. In addition, the A&CC conducts post approval inspections and investigations of equipment to assure that products are being manufactured in exact accordance with the approved design and specifications.

Finally, MSHA's enforcement personnel, as a part of their regular activities, inspect approved equipment in the mines.

In summary, the Approval and Certification Center's primary responsibility is to administer the requirements of parts 11 through 36 of title 30 in order to assure that safe mining equipment, systems, instruments, and materials are used in underground mines. It is also responsible for assuring the quality and integrity of the approvals granted by MSHA. The procedures I have just discussed are carefully administered by MSHA as a part of its overall function and mission: To assure that the miners of the Nation as safe and healthful a working environment as possible.

I thank you, sir.

Mr. BEDELL. I want to thank you all for your testimony.

As chairman, I would be remiss if I didn't tell you, as far as I am concerned, this subcommittee has no interest in doing anything that would in any way jeopardize the safety of miners in any way.

I have to tell you I am a little disturbed by your testimony because I think it implies that that is what we are doing. And at least as chairman of this committee, I want you to know that we absolutely, under no circumstances, would do such a thing. Our interest herein is to see that our society operates in a manner where there is adequate competition. With that, I will recognize Mr. Sisisky.

Mr. SISISKY. I thought it was interesting, this testimony, Mr. Dalzell, isn't it?

Mr. DALZELL. Yes, sir.

Mr. SISISKY. Did Mr. Alexandres submit his product to you?

Mr. DALZELL. Mr. Alexandres submitted letters to us requesting evaluation of his product.

Mr. SISISKY. But his product would never be accepted, no matter what you did, unless it had Factory Mutual certification. Am I correct?

Mr. DALZELL. No, sir.

Mr. SISISKY. Well, did you certify his product, did you test it?

Mr. DALZELL. No, sir; we did not.

Mr. SISISKY. Why did you not?

Mr. DALZELL. Not as a formal part of the application system, we did not.

Mr. SISISKY. Why did you not?

Mr. DALZELL. MSHA considers that equipment that is intrinsically safe is to be approved as a system. The battery pack that was requested to be approved would in fact form a component or a part of that system. Therefore, in order to have MSHA approve that particular battery pack, you would have to become a part of the system, a complete system, including the transceiver itself.

Mr. SISISKY. Now that's fine. But in the previous statement it was said that you are opening up all of these doors to small businesses. How can a small business ever get there? How can they ever become part? And I would just call your attention to paragraph 23.8—a thorough inspection of the telephone or signaling device will be made to determine its adequacy and permissibility. Tests may be made to check the electrical characteristics and constant of the various parts.

Isn't that a various part? Isn't that a part?

Mr. DALZELL. It certainly is a part, but the part has to be considered as a system, because with intrinsically safe circuitry, any individual part may have an effect on the overall operation of that system.

Mr. SISISKY. Well, it says also, further, under 18.68, title 1: Intrinsically safe circuits and/or components will be subjected to tests consisting of making and breaking intrinsically safe circuit under conditions judged to simulate the most hazardous probable faults of a malfunction, and so forth.

I am a little mixed up here and, again, I reiterate what the chairman says—we don't want to do anything that jeopardizes mine safety. But to me, the testimony is a little bit fuzzy.

I would ask Mr. Reed——

Mr. REED. Yes, sir.

Mr. SISISKY. You are an attorney?

Mr. REED. Yes, sir.

Mr. SISISKY. If one testing laboratory could use the Motorola equipment to test a battery, why couldn't you? Is that your rules and regulations?

Mr. REED. Sir, I am going to have to defer to the engineering expertise of Mr. Rennie in that respect. He is better qualified to answer your question, I believe.

Mr. RENNIE. Mr. Sisisky, Mr. Chairman, if you would like, because I detect a lack of background knowledge on the part of a number of people here on just what is intrinsic safety—if I could

take a few minutes, I could explain it perhaps in a manner that would allow a more common base for us all to operate on.

Within the United States there are three classifications for hazardous locations—these are class I, class II, and class III. Class I is a gas atmosphere where the hazard is brought about, obviously, by the gas/air mixture. Class II is dust, and class III is fibers.

In the general sense, the protection methods apply to all of them, but let us specifically address class 1, the gas atmosphere, which I believe Mr. Alexandres was principally interested in. Within the gas atmosphere of class I, there are three major protection methods for electrical apparatus, things are explosion proof, purged and pressurized, or they are intrinsically safe. OK?

Intrinsic safety is the point in question, or the protection method in question here today. Intrinsic safety, prior to 1978, on a national level—and when I talk about a national level, I am talking about consensus standards promulgated through ANSI. Intrinsic safety was, as has been expressed here, a system, an integrated system approach where, as an example, if a battery was submitted, it would not be undertaken to be evaluated as intrinsically safe, but would have to be done in conjunction with the radio.

The reason is that the protection method involves the analysis of the system under fault conditions. There are inductances and capacitances that can store energy outside of a battery, which, in fact, can release energy to cause ignition in these atmospheres. That is why it is an integrated system approach. It allows the proper technical evaluation to be done.

In the case of most radios, it is normal that modifications to these radios are happening not only monthly, but weekly. We, as an organization who approve and test radios, are notified almost weekly of changes to radios.

It is very, very difficult—from a practical sense—and to be very candid, from a socially responsible sense—to properly evaluate these devices, the battery, unless we have complete access to the information on the radios, and their most recent revision levels. An inductor could be added to the radio through a revision process, which could cause an ignition, which prior to that point, had had a smaller inductor which was perfectly all right. Unless we can marry these items together, we can create a problem where we have something that can cause an explosion.

Mr. SISISKY. Are you saying that Motorola revises their radio on a weekly basis?

Mr. RENNIE. Sir, it is unbelievable, the revisions that come through on radios.

Mr. SISISKY. On a weekly basis—I ask you again—on a weekly basis?

Mr. RENNIE. I have seen them on a weekly basis, yes, sir.

Mr. SISISKY. Even a monthly basis, it seems unbelievable.

Mr. RENNIE. Yes, sir; the technical revisions that go on. It is a very high tech industry, very fast, relatively fast moving industry.

Mr. BEDELL. Would the gentleman yield?

Mr. SISISKY. Yes.

Mr. BEDELL. The chairman owes an apology to the subcommittee. We normally swear witnesses in, but the chairman failed to do that.

Mr. SISISKY. Excuse me. I wasn't trying to trap him or anything.

Mr. RENNIE. If you would like to swear me in I will go back and research some more.

Mr. BEDELL. It is difficult for anybody to believe that Motorola is changing their radios, every week, sir.

Now, we are just common people, and we don't make Motorola radios. But for us to believe that every week Motorola is changing their radio is pretty difficult for many of us to swallow, I think.

Excuse me, Mr. Sisisky, it is your time.

Mr. SISISKY. In everything that Factory Mutual does, you must have the original component; in other words, integrated. Am I correct in that, there are no exceptions?

Mr. RENNIE. No, sir.

Mr. SISISKY. You make no exceptions at all?

Mr. RENNIE. No, sir.

Mr. SISISKY. It has to be the total system?

Mr. RENNIE. No, sir.

As I had previously mentioned, up until 1978, all intrinsically safe work was done by Factory Mutual and by other testing laboratories within the United States on a system basis.

After 1978, a national concensus standard was promulgated through ANSI and the National Fire Protection Association. This allowed what is known as an entity concept to be adopted.

Now, let me tell you before I describe that entity concept, that the practicality of it, in my mind, is very questionable as to its real marketability for Mr. Alexandres and his company.

In the "entity concept," one would take components and establish the output criteria coming from that component. When we list that device or component, and using the battery as a case, we would list the maximum voltage, maximum current that can come from the battery, and the maximum inductance, and maximum capacitance that it can feed.

We would then take the other component, from whomever, whether it would be Motorola or Standard Communications, or some of the other radio manufacturers that we deal with. And we would list, at their request, their maximum input criteria, ergo, if you could take the maximum input criteria and the output criteria, and marry them together, you would have a safe system. Nobody has elected to come to us from the radio industry to establish the approval of their product under those conditions. They have all approached under the condition that we would approve the product only under a system basis.

Mr. SISISKY. Again, it is very technical what you are telling us, and you are talking to somebody that is not a specialist in that, so forgive me if I just ask just very simple questions.

If, indeed, they do change—whether it would be weekly, or monthly, or whatever it may be—you then test that radio with a Motorola battery pack; is that correct?

Mr. RENNIE. We would test it with what we have it approved with—and in the case of Motorola, yes, sir; it is a Motorola battery pack.

Mr. SISISKY. Then why could you not test again with a battery, say, you approved before, and say, you know, this one does not fit the criteria——

Mr. RENNIE. Yes, sir.

Mr. SISISKY [continuing]. That Motorola—why could you not do that?

Mr. RENNIE. I will defer to Bill on my right, but my answer is that we obtained that information under contract to Motorola; Motorola has not allowed us to release that information for use with other competitive products.

Mr. SISISKY. I understood now—there was testimony given previous to this, that these plans are readily available, the schematic drawings are readily available; is that true, or is not true?

Mr. RENNIE. As I would understand it—I have never bought one—but, yes, one could go out onto the marketplace, one could buy a Motorola radio; one could buy the schematic for that radio, but not necessarily for the subsequent revisions that could come out tomorrow.

Mr. SISISKY. Well, what I am saying is, wouldn't they do the schematics then? If they provide the schematics as they sell the radio, I assume they give it to the person who buys the radio.

All I am really saying is, would you not satisfy the requirements by testing the other battery pack that has been approved before with this radio and say, "I'm sorry, you do not fit the new type of Motorola, and you cannot be certified for that brand."

Mr. RENNIE. It is cumbersome. From a strictly technical sense, what you are proposing can be done. From a practical sense, however, it is almost impossible.

Mr. SISISKY. Yes, but you have to—the point I am making is, that Motorola has to do that battery pack also, and change with the type of radio—I would assume.

Mr. RENNIE. And Motorola submits all that information to us, sir, and we go through the evaluation, yes, sir, under contract.

Mr. SISISKY. Isn't this one way, to cut the entry to new—and I don't blame Motorola, but wouldn't that be one way to prevent entry into the market for small business. U.S. Goverment can not promote that.

Mr. RENNIE. If I understand your question, Mr. Sisisky, Mr. Alexandres could come to us basically with the Motorola schematics; we would test and evaluate that device, if necessary. If it passed all tests, approve it through that particular revision. My concern is that the revision would change tomorrow and I don't know what is going to happen then. And Mr. Alexandres would then have to go back out into the marketplace. In fact, to tell Mr. Alexandres that there was a change, I would have to violate the information that Motorola had sent to me, saying that there is a change.

Mr. BEDELL. Would the gentleman yield?

Mr. SISISKY. Yes.

Mr. RENNIE. I am on the horns of a dilemma.

Mr. BEDELL. Mr. Reed, you are an attorney?

Mr. REED. Yes, sir.

Mr. BEDELL. Is there any reason in the world that if you wanted to say to Motorola, if you want us to test your equipment you have to give us permission to use that information in testing other equipment?

Mr. REED. Sir, I am sure we could design our contracts whereby for us to do that kind of testing, we could make it a term of the

contract whereby they would allow us to make that information available.

Mr. BEDELL. No, you don't have to make it available to anybody, but use it yourself to do the testing.

Mr. REED. Well, the problem is this: Let's assume that Mr. Alexandres came to us and requested that we test the battery using the Motorola information without providing it to him. Now, let's assume further that we did not approve it.

I think it is fair to speculate that Mr. Alexandres would become, at the least, a little bit concerned that we were testing batteries against a certain criteria that we can't disclose to him.

Mr. BEDELL. Well, you have got to tell him why they did not approve the battery, but that's no secret.

Mr. REED. Well, in order to do that we may have to disclose to him the specifications for the Motorola unit that the battery is being tested with.

Mr. BEDELL. But could you require in your contract that if Motorola wants you to check their equipment, they have to give you permission to do that?

Mr. REED. We could.

Mr. BEDELL. Why do you not?

Mr. REED. Because of the problem that I have just identified, plus the fact that we are inclined to think that firms like Motorola would not seek approval. In which case, the particular Motorola unit did not have Factory Mutual——

Mr. BEDELL. It wouldn't matter then. They would go to MET, and somebody would go and get approval, and then we would have competition in the marketplace.

The concern I have is, it is very clear to me that what you are doing is stifling competition where you don't need to, and you are coming up with all sorts of crazy, crazy excuses, as far as this member is concerned, as to why you are doing it. You know, you can't treat us as if we are dummies. We are not dummies here.

Mr. REED. Mr. Bedell, there certainly is no——

Mr. BEDELL. Excuse me, Mr. Sisisky, it's your time.

Mr. SISISKY. I just want to direct one more question to Mr. Reed. We were walking over to vote—three of us—and we were wondering—tell me, because you brought it up, about the nonprofitability of your company. Tell me about the nonprofitability of your company. How many employees do you have at Factory Mutual?

Mr. REED. Let me say this. Mr. Bilirakis brought the question up to the first panel as to who Factory Mutual is. I once had the misfortune of having my deposition taken on that very issue, and it lasted 2 days. If you want me to go through that, I would, but I don't think this subcommittee needs to hear that.

To be concise about it, Factory Mutual Research Corp. is owned by a group of industrial property insurers. There are three companies in particular. They have been in business for 150 years, or at least their predecessor companies have. At one time there were 47 companies in the Factory Mutual system—with merger and consolidation, we are down to three. In fact, we are probably the largest single group of industrial property insurers in the world.

Because of their concern for industrial property preservation, over the course of years they established a research entity to do

things such as fire testing. We have a testing facility in West Gloucester, RI, where we do a whole array of different types of property-related tests, including for mine safety purposes.

The research operation, therefore, arose out of that. And it was a natural development into certifying and testing products for property safety purposes.

In terms of the nonprofitability, it is because that particular corporate entity does not make a profit, and it has been accepted as a nonprofit entity by the Internal Revenue Service. I can assure you that we have been thoroughly investigated.

Mr. SISISKY. Well, I am sure of that.

How many employees do you have?

Mr. REED. 185.

Mr. SISISKY. I guess we can get the information from the Internal Revenue Service under 501(c)(3).

Mr. REED. Yes, sir.

Mr. SISISKY. I will yield back the balance of my time. I may come back. Mr. Bilirakis is dying to ask a question.

Mr. BEDELL. Mr. Bilirakis?

Mr. BILIRAKIS. I show that, huh? Well, Mr. Chairman, I guess probably more than anything else, the question should be addressed to the Government people, I mean, that is really where the problem stems from.

Mr. Shepich and Mr. Dalzell, in reading, Mr. Dalzell, your short, abbreviated statement, which we are appreciative of, you don't mention the farming out of any of this testing to UL or Factory Mutual, or any other independent laboratory.

Is that not contemplated as being part of the scheme of things? It obviously is.

Mr. DALZELL. There are two program areas in which third party testing is acceptable; one is in the area of fuses and the other is in the area of part 36 which is diesel equipment. But in general, we do not have third party testing.

Mr. BILIRAKIS. Why were these batteries required to be tested on a third party basis?

Mr. DALZELL. They are not, sir.

Mr. BILIRAKIS. They are not?

Mr. DALZELL. May I defer to Mr. Marshall, who is our Chief of the Electrical Division, who is more expert in these areas.

Mr. BILIRAKIS. By all means.

Mr. MARSHALL. The batteries in question are not required to be tested by anyone else except MSHA, if they are to be used in equipment taken into underground mines. And in order for MSHA to test those batteries, they are required to be submitted to us as part of a system. In this particular case, since these batteries are to be used in a radio, that system would be the radio.

A point was brought up before relative to part 23—I think 23.8 was specifically mentioned—where it indicated tests may be made to check electrical characteristics and constants of various parts to determine the adequacy of insulation and other parts and features of the device. I think the point was made to indicate why we have refused to test this battery which is a part of the device.

However, if you look at part 23.5(d), I believe, it says that formal tests will not be made unless the device has been completely devel-

oped and is in a form that can be marketed. That was what we were saying, you have to have the equipment ready to go as a marketable system. When you do, then these are the types of tests that we would conduct.

So, that's the reason why we did not test the Alexand battery, or comparable device, under 23.8.

Mr. BILIRAKIS. Why can't it be marketed? Is the battery not in the form that can be marketed?

Mr. MARSHALL. Again, it is our responsibility to make sure that a completely assembled device, when delivered to the mines, is safe.

Mr. BILIRAKIS. You mean it must be assembled with the radio?

Mr. MARSHALL. Yes, that's the system that we are talking about here.

Mr. BILIRAKIS. All right, but if Mr. Alexandres were to buy—again I ask the question if he were to buy a Motorola radio and plug the battery into it and submit it to you, now you have got a complete device that can be marketed, even though, obviously, he is not doing the marketing of Motorola radio.

Is it a complete device at that point?

Mr. MARSHALL. Yes, it is a complete device. And this particular part, again, part 23, under which we would investigate a radio transscriber is specific to issuing approvals of a complete device. That is the whole purpose of those regulations.

The final product, as far as we are concerned, is the issuance of an approval. And in this particular case, there are specific regulations and requirements that have to be met by the applicant—we will use that term—so that we can issue an approval.

One of the requirements of an applicant, before we would issue an approval, is that he be capable of controlling the manufacture and assembly of a complete device. And just giving us a Motorola battery and saying this is the complete device, he cannot, in our estimation, control the manufacture and assembly of that device.

Mr. BILIRAKIS. But, sir, if he were to have received the seal, the certification seal of Factory Mutual, he still would not be able to control the entire device, because you are talking about the Motorola radio being a part of that device, right? Isn't that true?

Mr. MARSHALL. I don't understand the relationship because the Factory Mutual——

Mr. BILIRAKIS. You are saying that he cannot control the device because he does not manufacture the radio, he manufactures the battery, and the batteries only, but not the radio?

Mr. MARSHALL. That's correct.

Mr. BILIRAKIS. OK. So, basically what you are saying is that since he cannot control the manufacture of the radio that the battery goes into, that there is no way at all in the future that that battery can possibly be approved by MSHA?

Mr. SHEPICH. Mr. Bilirakis.

Mr. BILIRAKIS. Am I way off base?

Mr. SHEPICH. No, if I may attempt to answer that question. If I may also, before I do, though, apologize to the chairman and the members of the committee for an inference that may have been drawn that my statement suggested anything other than an evolution of the Federal involvement in mine safety and how it came

about, so that we could put today's discussion in context. I certainly did not intend to insult you, sir, and I apologize.

Mr. BILIRAKIS. And, sir, we understand. I think I can speak for the chairman and the committee, that there is no substitute for proper safety and adequate safety in the mines, and you realize that.

Mr. SHEPICH. I appreciate that, and appreciate your concerns for safety overall.

The important point that I was trying to draw out is that the Mine Safety and Health Regulations are designed for the mines, and that's all, and that they aren't designed for beyond the mines. The discussions this morning seem to, by necessity, go to Factory Mutual and to the Government and back. And in the case of mine safety, our regulations are specific for the mines only, and that was a very important point that I wanted to bring out.

With respect to your question will MSHA ever in the future be in a position to where—your question—where an individual battery could be tested and approved by MSHA, I can't say categorically that that would not be the case. The MSHA mine safety requirements have been derived either statutorily or under statutory authority through the rulemaking process. It is quite conceivable that future rulemaking may entertain that question and in dealing with it, come up with just the suggestion that you have.

We are saying that as of today, under our current statutory authority, or current regulatory authority; we don't have that ability. And, further, that at this time, we think that the criteria under which we judge the safety, that in these areas we need a systems approach to be able to assure the safety of the devices being taken into the especially gaseous areas of the mines.

There is one further point I would like to make for the benefit of the subcommittee. Not all of the mines, and not all areas of a given mine, must have intrinsically safe equipment. It is only in those parts of the mine that there is a potential for an explosion or a gaseous atmosphere where that's required.

Mr. BEDELL. Yes, but that is of very little consequence, because if somebody is going to buy one, they are going to buy one that is safe in all areas. Excuse me.

Mr. BILIRAKIS. And that is true, is it not?

Mr. SHEPICH. That is true. On the other hand, there are devices—perhaps even a radio transceiver, although I don't know this for a fact—that are in use in mines at this time that have not been approved simply because they are not being used in an area where the approval is required.

Mr. BILIRAKIS. If I own a coal mine—and thank God, I don't—but if I own a coal mine, in the interest of good business, but consistent with good practices and safety practices, and of course, yielding to your good wisdom in that regard—I am going to want to make the best buy that I can. And I can buy a battery for $75 versus anywhere from $100 to $200, I would prefer to do it, provided everything else being equal—safety, et cetera. I think I would be a little put out if every indication is that this bat[illegible] is every bit as safe. But then I sit in this hearing and I hear th[illegible] scenario. I mean, you would be, too, I would think.

Isn't the Government contributing to that type of a picture by virtue of basically requiring that this battery be tested by apparently one of two laboratories, and then, of course, determining—finding out, I mean, apparently it's obvious that these laboratories will refuse to test the battery? How are we then encouraging, the very foundation of this Republic of ours, which is small business?

Mr. SHEPICH. Yes, sir. Mr. Bilirakis, and that is the second point that I perfectly appreciate with my references to small business. In fact, the vast majority of the mines for which we are responsible under the Mine Safety Act are small businesses; the vast majority of mines having fewer than 20 persons underground.

It is also my understanding that a significant number, perhaps even a majority number of applicants for approvals to our approval and certification center are in a small business category if you use the criterion of employing fewer than 500 persons.

We don't believe that our current requirements keep any manufacturer from applying for and receiving approval, testing, and approval, of their product if they meet the specifications that have been evolved over the period of years from the history of our attempts, as you suggest, to bring about an improvement of mine safety and health.

As a matter of fact, we understand there are, I believe, 16 different models of radio transceivers that have current approvals from our center; and I believe there are over 30, or thereabouts, different kinds of radios and combinations of radios and batteries that have been tested and received approval by our agency.

Mr. BILIRAKIS. All right. If this battery, then, is plugged into a Motorola radio and is tested by one of the other testing laboratories other than the two major ones, apparently, and it's certified by one of those testing laboratories, would you then accept it?

Mr. SHEPICH. No, sir. At the present time, our requirements are that the transceivers that we are talking about for use in that part of the mine in which there are requirements that they be intrinsically safe, must be tested and approved by our agency. Perhaps Mr. Marshall could elaborate on that further.

Mr. MARSHALL. There may be a misconception in that we do not recognize or accept UL or Factory Mutual's testing data or results to determine whether or not this device can be approved or not. The testing that is done is done by MSHA, so that MSHA——

Mr. BILIRAKIS. So MSHA also tests the transceiver then.

Mr. MARSHALL. Yes, sir, they test it in combination. In this particular case they tested in combination.

Mr. BILIRAKIS. But this Motorola radio that is in question here—and their ears must be ringing, if they aren't in the audience, all day today—but this Motorola radio has not been tested and certified by your people?

Mr. MARSHALL. The reason I am hesitant in answering that is because when you say this Motorola radio—in going back over the correspondence that we did have with Alexander and the correspondence I have, I think there were two letters—one in 1978 and another one in 1980. I believe the one in 1978 asks us to evaluate and approve the use of their battery with two specific model numbers of Motorola radios. And, in fact, in going back through our ap-

proval records, we have identified those model numbers as being model numbers that are listed in our approval.

So to answer your question that that's the radio in question—yes, we did run tests on that in combination.

Mr. BILIRAKIS. Is Mr. Alexandres in the audience? Is that the radio in question?

Mr. ALEXANDRES. I don't know which letters he is talking about—I think 220——

Mr. SHEPICH. I think that illustrates, sir, though, the problem that we perceive in being able to allow, even if our regulations would permit, the approval of components. The confusion comes about as to which radio is being discussed, or which piece of equipment. And I think we could put that in the more generic sense and not necessarily just talk about the radio.

Mr. BEDELL. Could I read to you?

Mr. BILIRAKIS. Yes, I am going to yield, sir, only because I have to meet with an individual in the next room, and I am going to have to really get over there, it is very critical. But I will yield to you and maybe you can continue the same questioning and get into yours if you would, please. I am very curious to get answers.

Mr. BEDELL. I just wanted to tell you what Mr. Alexandres received a letter from these people, it reads as follows:

> The use of your battery pack and an approved instrument would violate the approval unless the approval holder gets its approval extended to include your battery pack as an optional item.

So what it says is, that we're not going to approve your battery unless Motorola says that we are supposed to approve your battery.

Mr. SHEPICH. That is a correct interpretation. Mr. Marshall may elaborate on it.

Mr. BEDELL. That would be of interest to the committee.

Mr. BILIRAKIS. Is there a proprietary tag or something that would require that?

Mr. MARSHALL. The way the regulation is written, and for a purpose, by the way, it is a systems approval that we are talking about. In this particular case, since we were asked to approve the battery pack for use on a Motorola battery—a transceiver, I'm sorry—the response to that was specific to the *Motorola* case. In general, the response would be that under our present regulations that if you wanted to get your battery pack approved, you would have to have a radio manufacturer—whether it be Motorola or whomever, I won't use any other names, but Motorola or whomever—who presently had an approval to submit it to us and request that they would like to have, or desired to have, the battery pack accepted as part of the total system. We do not approve the battery pack as a separate item.

If I might continue here—in looking at the request and our response, as we viewed this, this was certifying a battery pack really as a replacement part for the battery packs that were being presently used by Motorola on their approved batteries. And we do not have--and this is by design—a program to certify replacement parts.

Our concern in developing such a program, a program for approving component parts of devices as replacement parts, is the

scope that we feel we would have to address. There are literally thousands, hundreds of thousands of component parts on this approved equipment out in the mines, operating in the mines. Developing a replacement part program and having this number of parts being submitted to us for evaluation as replacement parts on specific pieces of equipment in the mines, quite frankly, concerns us very much because of the possibility of having so many that there would be a misapplication of replacement parts in the field and, therefore, the same degree of safety would not be guaranteed that we feel we are guaranteeing with the systems approach.

So, consequently, that is the reason that we did not approve Alexander's battery as a separate identity, and would not.

To get back to an earlier comment made by you, Mr. Sisisky. You did mention part 1868, specifically indicated that we would in fact test component parts of a circuit. In our letter to Alexander Manufacturing Co. in 1980, we did indicate that we would test his system for intrinsic safety under that particular part and gave him, at that time, applications procedures if he so desired to apply to us for those tests.

Mr. SISISKY. If the gentleman will yield—I can understand your reluctance for review of different parts of the radio. But batteries are a self-contained part that your inspectors can see very easily. You say you have a way of knowing what has been replaced. Do you take the radios apart? To say they may put a little celluloid in there of a different brand. How would you know? But a battery pack is a self-contained unit. If I saw the unit there—it comes from right under the radio. You should be able to tell.

So your argument about 100,000 different items doesn't hold water to me. You know, you are talking about a self-contained unit that clips on that your inspectors will readily be able to see. The other things they will not be able to see. Or did I misunderstand you somewhere?

Mr. SHEPICH. Mr. Sisisky, I would like to pick up on a point that was an earlier illustration, and the cap lamp used for illumination in the mines. In fact, that cap lamp also is required to be permissible and approved by the agency for use in these hazardous areas in the mine. The evolution of mine safety in the early days—and, in fact, this is a very good example, when candles, and then an open flame carbide lamp were used commonly in the mines—that candle or that open flame carbide lamp was found to be the source of ignitions and explosions. It was that experience that led to the requirements that the cap lamps be made intrinsically safe, thus permissible.

Many of the mines today that are not gassy, still do, in fact, use carbide—not many mines—use the carbide lamps. Some of the mines just use flashlights that are taken from the shelf of a hardware store, as an example, because the problem that needs to be controlled is not present in these mines. But in those mines that are gassy or in these mines that have been designated as gassy in the case of underground coal mines, we must have, for safety reasons, the certified or permissible cap lamp.

Mr. SISISKY. And I want you to have that. I have no problem with that.

Mr. SHEPICH. And I understand that.

Mr. SISISKY. I want you to have that.

Mr. BEDELL. Would the gentleman yield?

Mr. SISISKY. Surely.

Mr. BEDELL. You mentioned the cap lights. That comes originally as a unit, does it not?

Mr. SHEPICH. Yes, sir, it does.

Mr. BEDELL. Are there replaceable batteries for those cap lights?

Mr. SHEPICH. I would like Mr. Marshall to answer.

Mr. BEDELL. My question is: Do you have to buy the batteries from the same company that furnished you the original unit, or can you buy replaceable batteries from others and have you folks approve the batteries?

Mr. MARSHALL. I would like to answer that, Mr. Chairman.

An owner of an approved piece of equipment is obligated to replace any parts in his equipment or system with parts that were exactly like the approval documentation that we have back at the Center.

Mr. BEDELL. That is not my question.

Mr. MARSHALL. I was trying to get to it.

Mr. BEDELL. My question is: Have you approved batteries for replacement on miners' headlamps that are supplied by other than the original supplier of the headlamp unit?

Mr. MARSHALL. As a separate identity?

Mr. BEDELL. Yes. Can I buy and have it approved—do I have to buy my batteries from the same company from whom I buy my headlamp unit? I presume that's a unit with a light on it and a battery pack.

Do I have to buy the batteries from the same company that I bought that unit from?

Mr. SHEPICH. Sir, Mr. Marshall may correct me, but I believe the answer to your question is yes. However, there are multiple sources of cap lamps and battery combinations that can be used. They are not limited to just one manufacturer.

Mr. BEDELL. OK. So I do have to? I cannot buy a replacement battery from a battery company for a headlamp that has a light on it?

Mr. SHEPICH. That is correct, as Mr. Marshall, I believe, was trying to get to—and he may speak for himself—but unless in the initial approval application the manufacturer of that cap lamp specified testing and approval of more than the one battery.

Mr. BEDELL. Why would anybody be stupid enough to do that, for crying out loud? You act like people are trying to get competitors.

Do they have to buy the light bulb that is in there from the same company that you bought the unit from?

Mr. SHEPICH. Bob?

Mr. MARSHALL. Yes, sir, you do.

Mr. BEDELL. Do any of those companies make those light bulbs?

Mr. MARSHALL. I can't answer that question, I don't know specifically.

Mr. BEDELL. Well, surely they don't all make them.

Mr. MARSHALL. I would agree with you, they don't all make them.

Mr. BEDELL. But you can't buy it from the company that makes it—you have got to buy it from somebody else.

Mr. MARSHALL. No, you can buy it from the company—I was trying to——

Mr. BEDELL. And have it approved?

Mr. MARSHALL. Yes, sir, you can. And I was trying to explain that, and probably not doing a very good job.

For instance, if we would issue an approval to Company A, and as a part of that approval documentation, they were using a Company B light. Then the owner of that equipment when that light burned out, could either go back to Company A and ask them for a replacement light, or go to Company B and ask them to supply them with that light. So they don't have to go to the original equipment owner.

Mr. BEDELL. But the unit would not be approved, then, by you folks?

Mr. MARSHALL. Yes, sir, it would, because what we obligate the owner to do is to replace these parts with exactly the same part that we have approved. And if we have approved a Company A system with a Company B light, he certainly can go to Company B and buy it directly from him.

Mr. BEDELL. If the light is identified on it?

Mr. MARSHALL. Yes, sir.

Mr. BEDELL. Mr. Cooper, sorry to take your time.

Mr. COOPER. I don't want to get off the mining subject if you all want to stay on it for a while, but most of my questions were for Mr. Reed.

It seems that the position of your company and the position of UL, is basically private companies trying to do what I would view is a public job. I think your owners have implicitly recognized that, if your company is in fact a nonprofit organization. That is traditionally the tax treatment for an entity that has some sort of public responsibilities.

In my attempt to view the big picture of this, I come up with three worries, or, rather, groups of worries, and I will begin with the mildest. And that is, your goals—at least as stated in your testimony—I believe would be what your commitment to advance loss control knowledge and things like that. Goals like that, while they are understandable and they are even worthwhile, they are inherently conservative, anticompetitive goals.

It seems to me that your position is like that of a small town banker—they are all against having losses. And the easiest way not to have losses is to not loan out any money.

Mr. REED. Well, I am not sure——

Mr. COOPER. If I could continue just for a little bit.

It is an attitude that, if taken to an extreme, I worry, could have dangerous side effects. The easiest way for an insurance company not to lose money is not to take much risk. That is the easy approach; and I am not accusing your company of taking that approach. I am just saying that there are certain professions, occupations, whatever, that are inherently risky. And that means anytime somebody comes to you with a new product, you have a choice of whether to accept some of that risk, go out on a limb a little bit, and risk some of what you have built up over what, 150 years?—or whether to just deny the application.

Mr. REED. Let me explain a couple of things.

Mr. COOPER. Well, I had some other points, but go ahead.

Mr. REED. If you don't mind, I would like to respond as you raise them.

First of all, the Factory Mutual insurance companies are mutual insurance companies, which means by their very nature, they don't have stockholders. There is no board of people who are dependent upon the profits that are made by Factory Mutual.

Mr. COOPER. But as you are well aware, in most large enterprises today, whether they are stock, or mutual, the management controls the operation of the company. An individual policyholder in a mutual insurance company does not have much say as to the higher level actions of the board of directors or the other managers of the firm. It is controlled by the white collar folks, and they are out to make their company grow and expand, as they should do.

Mr. REED. I guess that is a rather argumentative issue.

Mr. COOPER. Show me one of your policyholders or one of their policyholders who takes an active concern in the day-to-day affairs of the company.

Mr. REED Well, considering the types of insureds that we have, with large and small industrial facilities, they are very active in the management of our companies. Whether that is unique to us or not, I am not in a position to state. But it seems to me that to the extent that we can reduce the incidence of property loss through our research activity, that is a socially acceptable and required task.

Mr. COOPER. But that should not be your exclusive goal. And in your testimony that is the only explicit goal that I saw stated. And as I say, the easiest way to prevent loss is not to take any risk.

One other statement that you made in terms of building your process, you say that, what, in a sense, amounts to peer review as an important factor. It seemed like you ran by us specifications with a number of companies. You say you forward them for industry review and comment. That is another process that, to me, seems inherently conservative and inherently anticompetitive.

If I were Motorola and you all sent me questionnaires on what we should go for—if it were something that Motorola, my company, was not interested in, or we hadn't advanced quite that far, sure, I would give you a negative answer.

Mr. REED. You are presuming that we would only submit a recommended standard to a company the size of Motorola, that we might not do it also to a firm like Alexander.

Mr. COOPER. Well, they are not a client of yours right now, are they?

Mr. REED. No, but I am not so sure that we would just submit such a proposed standard to only clients.

Mr. COOPER. The tendency, though, is to keep your clients happy, and you are not to be blamed for that. Even though you are a nonprofit corporation, you still have to cover some costs out there. And if you were to lose 800 clients tomorrow, your company would have a significant problem. You have to at least keep a stable base of clients to maintain your nonprofit status. You don't want to go to your owners and say, look, we turned in a whopping loss this year.

Mr. REED. Well, based on that very premise, don't you think it would be, from a business perspective, desirable for us to take on

Alexander Battery Manufacturing Co. and others similarly situated as additional clients?

Mr. COOPER. I am not sure how much risk either your company or your owners are really interested in, and that is what I am trying to get to.

But this is my first group of concerns—that your philosophy is inherently conservative and anticompetitive. That is, as I say, not really to be faulted—you are just doing your job, but have limited vision.

Mr. REED. We are not trying to limit the field of competition.

Mr. COOPER. Well, maybe not explicitly. Bankers don't necessarily want to limit the growth of a community, but the banking philosophy is: Don't lose money. A banker is punished for a bad loan. He is not necessarily rewarded for a great loan. So the banking employee tends, in a given situation, not to loan out the money, not to take the risk.

Mr. REED. We tend to lose money where the environment, the insured environment, is itself filled with risks. And that is what we are trying to prevent.

Mr. COOPER. My second group of concerns is this, and this will find a little bit more fault with your company and, again, I know little, if anything, about your company. There seems to be a tendency in a position of anyone like yours, and that's to, in a sense, get lazy. Your company has existed for, what, 150 years?

Mr. REED. Yes.

Mr. COOPER. It sounds like a solid, blue chip outfit. It sounds great. I envy your position in the market. I think, though, that a tendency with that is to not really enjoy public scrutiny; to enjoy your position in the market as the gatekeeper of product entry. I worry that it is a natural human and corporate tendency to become lazy. I worry that that could unintentionally, perhaps, stifle competition.

Several of the things that you all have said today—the comments from Mr. Rennie—that Motorola changes once a week. I don't think there are two people in this room who believe that Motorola changes once a week. But it creates a perception to me that even if Motorola changed once a month, that it is an aggravation for you all to have to deal with it, and it is an aggravation. So what is the natural response? Not to deal with it, to not bother.

Mr. REED. The other is if we have to deal with.

Mr. COOPER. But not in regard to Mr. Alexandres' battery. You know, there are marginal effects, then it gets to be too much trouble. Any self-satisfied company that is in a good niche in the market takes it easy without competition to force them to pay more attention.

But my third and even more worrisome group of concerns would be these: I think a company in your position is open to a series of possible conflicts of interest. For your employees, is there any code of ethics explicitly written down that governs their behavior?

Mr. REED. Absolutely. We have a written corporate policy on ethics.

Mr. COOPER. Could you provide that to the committee?

Mr. REED. Be glad to.

[The document referred to above follows:]

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	AUTHOR PRESIDENT	
	EFFECTIVE DATE JUNE 13, 1979	
	REPLACES A-160 OF 3-24-77	
SUBJECT STATEMENT OF CORPORATE POLICY ON ETHICS		

POLICY

In furtherance of FMEC/EA/RC (hereinafter referred to as FM) stated purposes and objectives, this Statement of Corporate Policy on Ethics is made and affirmed by the Boards of Directors and Board of Managers.

It is to be recognized and accepted by all FM employees at every level that our organizations provide a valuable and essential business service to the Factory Mutual System Companies and to the public. It is accordingly incumbent upon every employee to recognize that his or her performance and standard of conduct is a reflection of our organization's integrity and reputation. Stated within our Manuals of Practices & Procedures are specific directives which supplement this Statement of Corporate Policy.

The FM Wage and Salary Administration Program is intended to compensate all full-time employees for devoting a full-time effort to their respective job functions. It is recognized that such employees may devote whatever personal time they desire to other interests provided they do not sacrifice the mental and physical energy requirements of their FM job function. The right of an employee to engage in part-time employment is respected; however, any part-time employment or other personal time activity which would in any way conflict with or reflect adversely upon FM or the employee's employment by FM must be avoided.

All employees must avoid any activity which does or may involve a conflict between their personal interests and the interests of FM or which does or may place FM or the employee in a compromising situation which could adversely affect the employee's job responsibility or the employee's obligation to protect and promote the best interests of FM.

While it is impossible to list every circumstance giving rise to possible conflicts of interests, the following will serve as a guide to the types of activities which might cause conflicts and which should be fully reported to the employee's supervisor.

(a) Ownership by an employee or any member of his or her immediate family of a financial interest in any outside concern which does business with, or is a competitor of the FM System, except where such interest consists of securities of a publicly-owned corporation and such securities are regularly traded on the open market.

(b) Solicitation or acceptance directly or indirectly by any employee or any member of his or her immediate family of gifts of more than a token value, loans (other than from established banking or financial institutions), excessive entertainment, money or other substantial favors or services from any individual, outside concern or government agency which does or is seeking to do business with or is a competitor of the FM System. Employees should not solicit, purchase or otherwise acquire, directly or indirectly, property of any nature, gifts, favors or services of any type from any source through use of their position with FM.

(c) The giving directly or indirectly by an employee or any member of his or her immediate family of gifts of more than a token value, excessive entertainment, money or other substantial favors or services to any individual, outside concern or government agency which does or is seeking to do business with, or is a competitor of the FM System or with whom the FM System is seeking to do business.

(d) Rendition by an employee of any FM service of a directive, managerial or consultative nature for any type of remuneration to any individual or outside concern, except with FM's knowledge and consent.

Company contributions of a political nature to individuals, political parties, political committees or causes where permitted by law may be made only in strict compliance of the law and with the knowledge and approval of the President-Chief Executive Officer. Company contributions of any political nature shall not be made through an employee as a personal contribution, nor shall employees make such personal contributions in the name of FM.

Any acts of hospitality towards public officials should be performed in the expectation they will become a matter of public knowledge. Such acts that would in any way compromise the integrity or impugn the reputation of the public official or FM must be avoided.

Employees should not use or allow the use of FM owned property for a personal use without the knowledge and consent of the employee's supervisor.

Employees should not in any way falsify records or reports, communications or information of any nature and in any manner for the benefit or advantage of an employee or FM.

Confidential information not within the public domain, of whatsoever nature and howsoever acquired, shall not be disclosed or used for the personal profit or advantage of an employee or anyone else.

FM must operate in strict compliance with applicable State and Federal Laws and State and Federal Governmental Regulatory Agency Rules and Regulations

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applicable to our business. Employees in performance of their respective job functions must similarly observe and abide by such laws and regulations.

Managers shall not conceal any relevant facts or information required and requested by FM's internal auditors, authorized independent auditors, or authorized government auditors or investigators.

It is to be noted that the purpose and intent of this Statement of Corporate Policy on Ethics and its provisions are applicable to FM's business relationship with any foreign business concern and within any foreign country including any foreign government, foreign official, foreign political party or candidate for foreign political office. R E V

For the protection of both FM and its employees, it is essential that every employee make prompt and full disclosure to his or her supervisor of any personal situation which may involve a potential conflict of interests or of the discovery of a violation of this Statement of Corporate Policy on Ethics.

Supervisors upon disclosure or discovery of a potential conflict of interests or a violation of this Statement shall make prompt and full disclosure to the General Counsel who will discuss it with the President-Chief Executive Officer and see that any proper investigative measures are taken. If the investigation does disclose a possible breach of ethics it will be reported to the Board of Directors. R E V

Mr. COOPER. Does the code of ethics govern things like ties with clients?

Mr. REED. Absolutely.

Mr. COOPER. On a strict basis, ownership, family ownership, all sorts of things like that?

Mr. REED. Yes.

Mr. COOPER. How about with your owners of the corporation? Are they subject to a code of ethics, the insurance companies which own your outfit? Do they own stock, or do they invest in any of your client companies, or related enterprises?

Mr. REED. I couldn't answer that. I can only speculate to the extent that some of the clients insured by the Factory Mutual group of companies are some of the major industrial organizations in this country, the likes of ITT and such. They may very well have stock.

Mr. COOPER. Is that a matter of concern to you?

Mr. REED. Not that I can think of offhand, really, no.

Mr. COOPER. You don't care whether your owners might have a significant stock ownership in one of your client companies?

Mr. REED. What you are suggesting is that we in Factory Mutual Research would allow whatever personal financial interest a manager would have to govern our activities. I don't believe there is any basis for that.

Mr. COOPER. It could influence a decision in a given case, and it should be disclosed, it seems to me. If you all are in fact the gatekeepers of the marketplace, people should know that a decision is unbiased and made without a direct financial conflict of interest.

Mr. REED. We don't even know in this particular case whether Motorola is insured by any of our companies. It is not a matter of where we become concerned. As a matter of fact, I think there is an intentional design to not allow ourselves to be dictated or in any way motivated by that, but to purposely avoid it.

Mr. COOPER. But if you don't care, or you don't investigate, if you don't look into these situations, doesn't that create a situation, es-

pecially over 150 years, where a very close relationship could be built up between one of your owners, or one of your top managers, and another company?

Mr. REED. Let me pose this to you. Is there necessarily a conflict of interest in the approval testing of, say, a Motorola radio unit where a particular vice president or president of one of our companies has stock in Motorola?

Mr. COOPER. I would be interested in knowing if that person had discretion over proving it or not, and whether he owned a significant stake of the company. To me, that is an item of interest. Certainly, if I were a competitor, I would be interested in knowing it.

Mr. REED. John?

Mr. RENNIE. I have been involved in testing Motorola radios—I have no stock in Motorola.

Mr. COOPER. I am not concerned about your situation. I am concerned about the policy of the company. I am sure that 99.9 percent of your people are the finest Americans who have ever lived, in Boston, MA, or wherever you are from. But, as I say, you have a private company that does have public responsibilities. And I think in carrying out those public responsibilities people are entitled to know, in fact, how fair and independent your judgment really is.

If I could ask this question: Are you, either of you two gentlemen, ever aware of a situation in which there has been a conflict of interest, or in which you have been pressured by a client, in which a client has said, hey, don't bother to test that, or, we know that idea is crazy, or, you know, there are a thousand different types of avenues of pressure. It would seem to me that it could have been applied to your company in the last 150 years. And I would like to know if you have been delightfully immune from those pressures for a century and a half.

Mr. REED. Sir, I will state, without equivocation, that I have not personally, nor am I aware of anybody else in our organization, who has had such pressure brought to bear upon them.

Mr. COOPER. Mr. Rennie?

Mr. RENNIE. Yes, sir, same thing. I have been with Factory Mutual going on 15 years now, and we are obviously subject to much, much technical discussion. We are involved in many technical committees on a national level and on an international level. In the sense that you mean do we have pressures brought on us from that point, yes, we have considerable technical discussion, but I don't think in the sense that you are talking about.

Mr. COOPER. Earlier, I believe you said, Mr. Rennie, that a given policy or attitude might discourage Motorola—and I just caught a snippet of your testimony. But it seemed to me that a company like yours does rely on a client base, like any company does. You are interested in attracting clients. Do you all have folks who go out and in any way encourage clients to come to your company, or client development folks, or PR people, whatever you would call it? Is there any aspect of your operation that is engaged in that?

Mr. RENNIE. To be very candid, we are all interested in expanding the base of our operation, as would any company be, as you have mentioned, Mr. Cooper. In the sense of PR, we have an approvals service brochure, and it describes our operation we will supply that to anybody who asks for it. We do get considerable

numbers of people requesting copies. Do we have mailings that and go into the marketplace and try to impact that marketplace? Currently, no, but I wouldn't say that we wouldn't do that, in an attempt to get a foothold into a market that we think we can do a very good job in.

Mr. COOPER. It just seems to me, again, that there are at least three different ways that you all have a tendency, or would have a tendency, just being human beings, to have an impact on the market that would be anticompetitive, and I hope that you gentlemen have escaped the temptation to engage in any of those. But over 150 years, with all the products you test and service, to me the potential is immense.

Mr. REED. Sir; there is going to be an element of anticompetitiveness. The question is whether or not the system is designed in such a fashion to promote anticompetitiveness. We discriminate, no doubt, between products that we find satisfactory from our standards points of view versus those that we don't.

Mr. COOPER. Again, the type of discrimination I am most concerned about is not against the products that don't measure up, but against the products that you don't bother to measure, or that is not worth your time to really pursue. If 90 percent of the existing market is composed of ballpoint pens, and somebody invents a new type of pen, that is based on a completely different type of principle that might take a lot of expensive equipment for you to gear up for; it might take a whole new type of standard, industry standard, to appreciate. That is going to be a difficult decision for you to make when you allocate resources.

The easy tendency, and the natural tendency, is just to go with the status quo. And, in most cases, that is probably not too harmful. But I think it does have a discouraging effect on those who do try to think up new ideas and come up with new products.

Mr. REED. Sir; we have never refused to test a product. We may refuse to test categories of products because, for example, the equipment necessary to test such equipment may be just more expensive than we can really handle. If it is a category that we do test and approve, and we have the capability of doing it, and that product fits within that category, we will test it.

Mr. BEDELL. Will the gentleman yield?

Mr. COOPER. Sure.

Mr. BEDELL. I don't think you want to say what you just said. You said you never refuse to test a product. We have people here whose products you refused to test.

Mr. REED. We didn't refuse to test Alexander's battery, sir.

Mr. BEDELL. You didn't?

Mr. REED. No. We told them what the criteria would be in order for us to test.

Mr. BEDELL. You told him you wouldn't test it unless you got approval from Motorola.

Mr. REED. No, not approval, sir, not in the same context as you have discussed previously with the gentleman from the mine authority.

Mr. BEDELL. Well, let me read your letter to him:

> Additionally, the radio manufacturer would have to include a statement on their radios which would identify your batteries as an alternate to the presently approved

battery packs. If you can obtain the cooperation from the radio manufacturer as outlined above, then we can proceed with an approval program for your batteries.

Now, if you don't interpret that as having to get approval from Motorola, I don't know what you are thinking. It seems pretty clear to me.

Do you disagree with that?

Mr. REED. I don't disagree with the letter, sir. But I think it goes back to the point that Mr. Rennie established earlier, that——

Mr. BEDELL. I think the committee——

Mr. REED [continuing]. There should be communication between the radio manufacturer and the battery manufacturer.

Mr. BEDELL. Well, I think the committee feels very strongly that that letter clearly says that unless Motorola cooperates and agrees and says we can do it, we are not going to test your battery.

I don't know how anybody could read that paragraph any differently than that unless you do, and if you do, I am sure you are the only person in the room that would do that, unless there are some Motorola people here. Sir?

Mr. COOPER. I couldn't agree with the chairman more. That is an excellent point. And it is just like a banker saying, we loan money to everybody if you can pay 30 percent interest. That is a pretty big if. You know, you test everybody's product, if they can get a large company to say that's fine to do it. It is a technical, yes, but it is really a no that you are giving these people.

If I could ask just one last one, or a couple of questions.

Mr. BEDELL. Of course.

Mr. COOPER. You say that your revenues come in on a contractual basis relating to the approval of devices. What sort of contracts are these? Are these flat fee contracts with the person who is seeking the approval?

Mr. RENNIE. Depending on the category, we fiscally operate with both fixed fee and basically time and material contracts. In the intrinsic safety area they are principally time and material.

Mr. COOPER. You don't have any contingency contracts?

Mr. RENNIE. I do not know what a contingency contract is.

Mr. COOPER. Well, in which you would receive more money if you approve the project.

Mr. RENNIE. No, no, sir.

Mr. COOPER. Uh-huh

Mr. RENNIE. Excuse me, let me answer that more completely for you, Mr. Cooper, because I am really not familiar with what you mean by contingency contracts.

Once we complete an approval of a product, there are followup inspections at the manufacturer's plant, the reexamination and quality control aspects to maintain the approval. And in that sense, yes, there are these ongoing costs that a manufacturer will incur with us to maintain the approval.

Mr. REED. Those are additional services.

Mr. RENNIE. Yes, it's additional service.

Mr. COOPER. Each product that is offered to you carries a separate contract with it, right? You don't have a standing arrangement with an RCA to test all their products for a year?

Mr. REED. Each product has its own particular contract.

Mr. COOPER. Who are your biggest clients in the recent history of your firm? Is there a top 10? Is there a big group that you court the most to make sure that they stay in your client stable? Are there folks who are your main revenue producers?

Mr. REED. We don't court anyone.

Mr. COOPER. Pardon?

Mr. REED. I think you are being presumptive that we court anyone.

Mr. COOPER. Well, I understood Mr. Rennie to say that you were contemplating mailings, and I viewed that as solicitation, or at least making the industry well aware of your services.

Mr. REED. All of our clients are a select group, and that is not the case.

Mr. COOPER. Any business has its key clients, its best friends, its most reliable revenue sources. And I would anticipate that the largest companies in America would be your most reliable revenue sources, wouldn't they? Because they come out with the weekly radio changes, and no telling how many other products they have other than radios. And if you are given a contract for each product each time, a company that produces 1,000 new goods a year would be your biggest revenue producer?

Who are your top 10, or your top 3 revenue producers for your firm?

Mr. RENNIE. I can't answer that. I honestly do not know, sir.

Mr. COOPER. Is it public information?

Mr. RENNIE. It has never been gathered by us.

Mr. COOPER. Well, would you be kind enough to supply the committee with your top 10?

Mr. RENNIE. For what period of time?

Mr. COOPER. Let's take the last calendar year. How about 1983?

Mr. RENNIE. Yes, sir, we can see the top of the list of who—and in the sense of the top 10, you are talking about who gave us the most income, not which of the 10 are the biggest companies?

Mr. COOPER. I am interested in who gave you the most income.

Mr. RENNIE. The most income.

[The list referred to above follows:]

The following list identifies those clients of Factory Mutual Research Corp. which in 1983 provided the largest amounts of revenue for approval testing: ASP International Inc.; Grinnell Fire Protection Systems Co., Inc.; Honeywell Inc. Protection System Division; American District Telegraph Co., Jim Walter Research Corp.; The Viking Corp.; Koppers Co., Inc.; General Fire Extinguishers; Amerace Corp. Control Products Division; and Plymouth Rubber Co., Inc.

Mr. COOPER. To me, that automatically creates another inherent bias. Even the large multinational companies who produce the most products every year, they would produce you the most revenue, they would be the folks who would comprise the majority of your stable client base; they would be the folks who were most economically important for your company.

Mr. REED. Sir, maybe it would be more appropriate to disclose to you our entire client base so that you could see that we do business with large and small alike.

Mr. COOPER. That would be fine, too.

But, see, my point is you can turn down a Mr. Alexandres and not suffer any real economic consequence, whereas, you can't

really turn down a Motorola without suffering some sort of economic consequence.

Mr. REED. No doubt, but if their product didn't meet our standards or they didn't provide us with the criteria, we would have to turn them down too, and I don't think you can assert with any foundation that we would do otherwise.

Mr. COOPER. But your standards are curious at best when you say that you accept any product for testing, and then write letters like you wrote Mr. Alexandres.

Mr. REED. We will accord them the opportunity for testing if——

Mr. COOPER. If they jump through 14 hoops that they might not be able to reach without getting their competitor's permission.

Mr. REED. There is data that each of them equally is subject to in order to get the approval.

Mr. COOPER. Again, your answer is a technical yes, but it is really a no in fact, I feel, for not only Mr. Alexandres, but for probably many others.

Mr. REED. As I said earlier, there may be some anticompetitiveness to this but it is not on an arbitrary basis.

Mr. COOPER. Is there any firm policy or ethical standard or board of directors guideline which mentions the goal of being procompetitive, or helping small businesses? Is there any explicit statement currently in use by your company that mentions any of these goals?

Mr. REED. Sir, I would have to refer you to our Practices and Procedures on that.

Mr. COOPER. But you are their corporate counsel, right? You are instantly aware of their ethical policies——

Mr. REED. Yes, I am.

Mr. COOPER [continuing]. And it is not included in their ethical policies?

Mr. REED. And that is because I have to sign a copy of it every year.

Mr. COOPER. But nothing mentioning competition as part of the ethical policy?

Mr. REED. I don't recall offhand. I would have to review it, it is a rather lengthy statement.

Mr. COOPER. Thank you, Mr. Chairman.

Mr. BEDELL. Thank you very much, Mr. Cooper.

I don't know which one of you I asked, but do you approve flashlights, not headlamps, but flashlights?

Mr. MARSHALL. Yes, sir; we do.

Mr. BEDELL. You do?

Mr. MARSHALL. Yes, sir.

Mr. BEDELL. If I make a flashlight, does the person who wants to buy batteries for that flashlight have to buy them from me, as they did with the others?

Mr. MARSHALL. Only if the battery that you specify when you apply to us for approval, and which is included in the documentation as your battery.

Mr. BEDELL. So I furnish you a flashlight.

Mr. MARSHALL. Yes, sir.

Mr. BEDELL. It has Eveready batteries in it.

Mr. MARSHALL. Yes, sir.

Mr. BEDELL. Does that mean that if I, a miner, buy that flashlight, that I have to buy that same Eveready battery to put in it if I am going to have approval?

Mr. MARSHALL. That's right, Mr. Chairman.

Mr. BEDELL. You do not approve batteries separately?

Mr. MARSHALL. No, we don't.

Mr. BEDELL. OK.

Mr. SISISKY. In practice is that adhered to in the mine?

Mr. SHEPICH. I would like to respond to that. In practice we would hope it would be adhered to in the mine. The fact of the matter is that we have a cadre of inspectors that are in the mine almost daily, and in many mines, periodically, to check those sorts of things. That is part of our responsibility in the agency.

Mr. BEDELL. You tested the Motorola radio and approved it with their battery pack, did you?

Mr. MARSHALL. Yes, sir.

Mr. BEDELL. How many models did you test?

Mr. MARSHALL. How many models?

Mr. BEDELL. Yes; do you know?

Mr. MARSHALL. I don't know offhand exactly how many models we tested. I believe we have issued 12 separate approvals to Motorola and in those approvals there could be several different models per approval.

Mr. BEDELL. Those are different approvals at different times; is that right?

Mr. MARSHALL. Yes, they are separate approvals.

Mr. BEDELL. It could be one radio that has changed 12 times, or it could be 12 radios once, or somewhere in between, is that right?

Mr. MARSHALL. No, what I meant by that is that they would be—the approvals cover a distinct Motorola radio. OK, so there would be 12 separate models. However, if, after we originally approved a distinct model, they wanted to modify in some manner, they would come to us and ask us to accept that modification, and that would be included in that same approval. So, although we have issued 12 separate approvals, in each one of those approvals there could be modifications made.

Mr. BEDELL. So it is roughly 12 models, then, you are telling us?

Mr. MARSHALL. Distinct; yes, sir.

Mr. BEDELL. Yes; then when they make a change, they come back for you to approve it again with the change in it?

Mr. MARSHALL. If the change they want to make is a change that is critical to one of our requirements and has been documented in our approval documentation, they would have to come to us. If it is a change that is not critical and not documented by us, they could make that change without coming back to us.

Mr. BEDELL. They wouldn't even have to come back to you to make the change?

Mr. MARSHALL. That is correct.

Mr. BEDELL. And then you wouldn't test the battery again, or anything, if they did that?

Mr. MARSHALL. No, because in our approval documentation that we send back to the manufacturer, we say that you must build this according to these drawings and specification. And as long as you do, you can put our seal on it. And if it is not specifically identified

in there, then we have determined that it is not critical, therefore, they can change it without having to come back.

Mr. BEDELL. You operate the same way, Mr. Rennie?

Mr. RENNIE. No, sir, we require notification of all changes from Motorola.

Mr. BEDELL. And then do you test at the time there is a change?

Mr. RENNIE. It really depends on what the change is. We review that change and then decide whether the change should be acceptable without any further test, or if we should test. So it is a matter of what the change is.

Mr. BEDELL. And then would you test their battery at the same time?

Mr. RENNIE. If that is part of what we need to reexamine, yes, sir.

Mr. BEDELL. How frequently would you do that testing—on the same unit?

Mr. RENNIE. Unlike the gentleman from the mines, we approve dozens and dozens of Motorola radios. I really hesitate to say that. I have personally done it years ago when I was involved directly in the testing myself, I probably had done it two, three, or four times over a period of maybe 3 or 4 years that I really had to go back and test; whereas, I would review many changes, and determine that I did not have to retest, because the changes were rather inconsequential to the effects on intrinsic safety.

Mr. BEDELL. And you would go back once a year and test that one model?

Mr. RENNIE. You are holding me to something, or you are trying to get words out of me, sir, that I really can't give you with precision.

Mr. BEDELL. Well, you did the testing, you must have some idea of whether you did it once a month or once every 5 years? You don't have any idea of how often?

Mr. RENNIE. Not 12 years ago, sir, no, sir.

I can only say that I had done it, it was done several times, four or five times, in the course of 4 or 5 years. The models involved, I can tell you, that as an example there may be one model, but there are many permutations and combinations of that model.

Mr. BEDELL. How many models did Mr. Alexandres want his battery approved for, do you know?

Mr. RENNIE. I believe in the general sense, he requested four. There is a letter attached to a piece of paper here which details that—but I believe there was four.

Mr. BEDELL. Four models?

Mr. RENNIE. I believe four models; yes, sir.

Mr. BEDELL. And you test those four models of Motorola radios together with the battery, I take it?

Mr. RENNIE. I would assume that, sir, I didn't personally do that, but yes, I would assume that it was done.

Mr. BEDELL. And you test them as a unit?

Mr. RENNIE. In that case, yes, sir.

Mr. BEDELL. And you think that you retest them something on the order of once every 12 months? That would be a ballpark figure.

Mr. RENNIE. We are retesting because the change to the radio would have necessitated that retest.

Mr. BEDELL. And that takes place something on the order of once a year?

Mr. RENNIE. Something in the order of that, sir.

Mr. BEDELL. I presume you could make that information available to the committee on those four models?

Mr. RENNIE. Yes, sir; in fact, I am going to go back and try to make available to the committee the number of changes that we get because there seems to be a great deal of question.

Mr. BEDELL. I don't think we care about the changes. The only thing we care about is the changes that are of sufficient significance that they would require testing, because if they don't require any testing, then it seems to me that an already tested and approved battery works as well as another. You would not have to test the battery again if the testing is not required.

Mr. RENNIE. Fine, sir; if somebody would like to take the responsibility for reviewing the dozens and dozens of changes to make that determination.

Mr. BEDELL. Sure, but you do. You told me you review those changes.

Mr. RENNIE. Yes, sir.

Mr. BEDELL. You are going to make that determination anyway, as I understand it?

Mr. RENNIE. That's correct.

Mr. BEDELL. So that is something you are going to do anyway.

Mr. RENNIE. That's correct, sir.

Mr. BEDELL. And what you would be required to do, if you approve Mr. Alexandres battery, is to test his battery in the equipment at such times as you have to retest the equipment.

Mr. RENNIE. We would have to transfer that knowledge obtained under the Motorola contract.

Mr. BEDELL. So it seems to me that it would be of interest to the subcommittee, if you are willing to furnish the four units that we are talking about, if you would furnish us the information of the last 4 years, how many times you have tested those four models because of changes.

Would you be willing to do that for the subcommittee?

Mr. RENNIE. Yes, sir; I think we can get that information for you.

Mr. BEDELL. I think that would be most helpful.

[The information referred to above follows:]

Factory Mutual Research records indicate that in the past 4 years, there have been 242 changes submitted relating to portable radios. Upon review of these changes, it was determined that in 10 instances, further examination or testing was necessary.

Mr. BEDELL. How do you folks charge people?

Mr. MARSHALL. In each one of our parts of title 30, Code of Federal Regulations, I believe it is there. There is a fee schedule, and it is set fee. It is not on an hourly basis; it is a set fee for various functions that we have to perform in evaluating the equipment or the system for approval.

Mr. BEDELL. OK, so you don't charge according to how much it cost to do the work?

Mr. MARSHALL. No, sir, we don't.

Mr. BEDELL. Is there a reason for that?

Mr. MARSHALL. I just believe that——

Mr. BEDELL. You make the regulations—your organization makes the regulations under which you operate, do you not?

Mr. MARSHALL. Yes, sir, we do.

Mr. BEDELL. You are talking about the regulations, but they are your regulations, aren't they?

Mr. MARSHALL. Yes, sir.

Mr. REED. Yes, sir.

Mr. BEDELL. How do you folks charge?

Mr. REED. On a contract basis, sir, depending upon time and materials.

Mr. BEDELL. So you write a separate contract for each?

Mr. REED. Yes, sir.

Mr. BEDELL. Do any of those contracts ever include a percentage of the sales of the item?

Mr. REED. Absolutely not.

Mr. BEDELL. OK. I have a final question, then we have got to run.

I, for one, think that this is just absolutely deplorable, what is happening here—for a Government agency to refuse to test items is unbelievable to me; and for you folks to refuse to test items after the testimony we have had, to me just seems absolutely—I just can't imagine it, frankly, in our society.

I assume the only thing we can do is try to pass a law—introduce legislation—and try to pass a law that says if there are going to be independent testing laboratories operating, that they have to agree to test all equipment on an equal basis.

Yes, Mr. Cooper?

Mr. COOPER. If I could just ask two more questions, I think it might be important to get it on the record.

So much of what we have dealt with is when you refuse to test, or refuse to really, in fact, to test.

I would just like to ask two questions. No. 1, have you ever done any favors and granted unusually fast approvals of products? And, if so, when?

And, No. 2, have you ever granted approvals for products when, in fact, there were no guidelines, or no existing industry standards? Did you just go ahead and make up standards without using your usual procedures, which I take it includes some peer review?

Mr. REED. Speaking personally, sir, my answer to both questions is no. I will defer to Mr. Rennie because of his daily involvement in these activities.

Mr. RENNIE. With regard to your second question, do we ever approve products where there is no existing, if you will, published standard. The answer is yes, we do develop criteria working with manufacturers who come in with relatively new and innovative products, and we will develop test programs to approve those products.

Mr. COOPER. How about my speed question, have you ever been real fast in granting an approval?

Mr. RENNIE. No, sir, in fact, we are accused of being amongst the slowest people in the world. Basically it is because of our backlog of work, and I can give you one personal experience where we refused

to go onto overtime with the radio company in question because it would not be fair to the other clients who are waiting.

Mr. COOPER. But you know of no case in which your best client got speedy treatment?

Mr. RENNIE. No, sir.

Mr. BEDELL. Thank you. Any further questions? Mr. Sisisky?

Mr. SISISKY. You heard me ask a question about certifying testing laboratories. Does any agency other than your companies that you represent—insurance companies—certify your company? I could visualize—abuse. Who is a good testing laboratory? Companies could go shopping and that would be a great disaster. And if we ever did anything in this Congress to allow with that, we would be doing harm to the public. But yet, legislation could be formulated that—the Bureau of Standards, or other agencies of this Government.

I don't want to create more bureaucracy but we do want to encourage more competition, and I think we could look at legislation. So my question is, Who checks you?

Mr. RENNIE. I guess I have to answer that in a couple of ways. In many areas, nobody checks us in a sense, or nobody accredits us in many areas. There are other areas where we are accredited by organizations.

In one example we are a testing organization for thermal insulation. Under that program we are accredited, through the Department of Commerce, the National Bureau of Standards, under their National Voluntary Laboratory Accreditation Program, and we are subject to annual reviews, cross tests, and that is done on an annual basis.

There is one instance where we in fact are accredited by an organization. We hold accreditation from, or recognition, rather than to use the word accreditation, from several other areas. Some are, if you will, no more than will you accredit us?—the answer being—will you recognize us?—the answer being yes.

Others require that we provide rather extensive documentation and review. An example is the city of Los Angeles.

Mr. SISISKY. That leads me to my next question.

Mr. RENNIE. OSHA has proposed regulations, incidentally, which I guess are going to be discussed starting next week, which will involve the accreditation of laboratories like ours.

Mr. SISISKY. To your knowledge, do your insurance companies who own you lobby in any States for certification for your company. I notice somebody mentioned the city of Chicago. To your knowledge, do you lobby for that to happen, or do your companies lobby—the insurance lobby is a pretty strong lobby.

I was in State government for a good number of years. Is there any lobbying activity to see that your name or UL, or whatever it may be, required for certification?

Mr. REED. I am not aware, sir, of any lobbying undertaken by any of the three insurance companies. Keep in mind, please, that the activities and operation of the research corporation are separate and apart from the insurance companies. And I can't think of an instance offhand where management of one of the insurance companies has participated, or become involved in the activities of

the research organization. And I am not aware of any lobbying done by them on our behalf.

Mr. SISISKY. Thank you.

Mr. BEDELL. We have one final witness. This is a series of votes, is it not?

Mr. SISISKY. Yes, an alloted 5-minute vote, following the——

Mr. BEDELL. Oh, it is just one vote following the——

We probably can come back then. It is up to the subcommittee. It would be my preference that we go vote and come back—it would probably be 20 minutes—I imagine, and finish our last witness. What are the wishes of the members of the subcommittee?

Mr. COOPER. I am afraid I can't come back.

Mr. BEDELL. Would you rather come back at 2 o'clock?

Mr. COOPER. I can do that but I don't want you to hold me to it.

Mr. SISISKY. I have another meeting at 2 o'clock.

Mr. BEDELL. Ms. Pedersen, are you in the audience? What is best for you?

Ms. PEDERSEN. I am free, Mr. Chairman, it really doesn't make any difference.

Mr. BEDELL. Is that all right, Mr. Cooper?

Mr. COOPER. That's all right.

Mr. BEDELL. If that is all right, we will go vote and come back, and take your testimony. The rest of you do not need to stay unless you wish to do so.

The subcommittee will be in recess while we go vote.

[A short recess was taken.]

Mr. BEDELL. The subcommittee will come to order.

Ms. Pedersen? Some of the other members are on their way, Ms. Pedersen, so you may proceed.

TESTIMONY OF AMANDA B. PEDERSEN, DEPUTY DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, ACCOMPANIED BY MICHAEL C. McCAREY, ASSOCIATE DIRECTOR FOR SERVICE INDUSTRY PRACTICES, AND EUGENE R. CURRY, STAFF ATTORNEY, FEDERAL TRADE COMMISSION

Ms. PEDERSEN. Thank you, Mr. Chairman.

I want to thank you for inviting me here today to discuss product standards and their impact on small business.

Before I begin, however, I would like to introduce the two colleagues who are with me from the Federal Trade Commission. To my right is Michael McCarey, who is the Associate Director for Service Industry Practices. He heads up the immediate division of the Commission where the standards and certification activities have taken place. To my left is Eugene Curry, one of the lawyers in Mr. McCarey's division, who has been very substantially involved in all of our standards and certification activities.

Mr. BEDELL. OK.

Ms. PEDERSEN. As you well know, the Commission has been examining the marketplace effects of private standards and certification since the early 1970's.

My prepared statement has already been submitted to the subcommittee and I would ask that it be made part of the record.

Mr. BEDELL. Without objection, it will be made part of the record.

Ms. PEDERSEN. Thank you.

I will, however, briefly summarize the points that we made in that statement. As a basic premise, standards and certifications play a critical role in the economy. They help to ensure an efficient flow of goods and services to consumers and to protect health and safety. While they sometimes can cause antitrust or consumer protection problems, in general, standards and certification programs provide significant competitive benefits.

Government agencies rely on private standards and certification programs because reliance is an efficient and practical way for using existing private sector expertise. If Government agencies did not rely on private standards and certification programs, they would have to spend considerable time and money to duplicate these very same programs. Numerous Federal, State, and local agencies adopt or refer to private standards for regulatory and procurement purposes.

Federal reliance on private standard programs is likely to increase. OMB circular A-119, which is entitled "Federal Participation in the Development and Use of Voluntary Standards," establishes a policy preference in favor of the use of private standards and certifications by Federal agencies. The purpose of the circular is to increase Government efficiency by reducing the costs of in-house standards development.

I would like to emphasize that reliance by Government agencies on private standards and certifications is not a source of concern in and of itself. Although these programs exclude products that do not meet their requirements and often will involve collective activity among competitors, something that is suspect in many antitrust contexts, the programs are generally beneficial for consumers. Government reliance on standards developers and certifiers is usually economical and well-founded.

Nevertheless, the standards and certification process may present opportunities for illegal conduct to industry participants who have a commercial interest in the outcome of the process. Because of their technical expertise, industry participants may be in a position to exercise a disproportionate and unreasonable influence in the standards and certification process to inhibit innovation, restrict entry into their market, or mislead consumers. When this occurs, there is both injury to competition and to consumers.

Further, if a Government agency is, in effect, enforcing an anticompetitive or misleading standard, the injury to competition and consumers is that much greater.

Similarly, we recognize that the unreasonable refusal of the certifier to approve products can be devastating to a business when approval by that laboratory has become mandatory.

In addition, Government selection of a particular standard as a basis of a regulation, or of a particular certifier to evaluate compliance with its regulations, can have a significant competitive impact. Unless Government agencies are sensitive to the competitive implications of their actions, and take steps to minimize any resulting adverse competitive impact, their reliance on standards and certifications may unnecessarily harm competition and consumers.

We also recognize that small businesses may be particularly affected by Government or private unreasonable standards and certifications decisions. Participation in standards development and certification activities can require a significant commitment of resources over long periods of time. A large company may find it easier than a small business to justify spending such resources. As a result, the interests of small businesses may not always be represented.

Similarly, unlike a large company having many products certified annually, a small business may not have an ongoing financial relationship with the certifier. Thus, the small business may be more vulnerable to arbitrary action by a certifier. And, finally, of course, small businesses may not always have the resources to challenge an adverse standards or certification action.

The Federal Trade Commission's efforts in the standards and certification area have been aimed at protecting consumers in competition without disrupting the beneficial activities of standards developers and certifiers. The Commission's activities are basically in three areas: First, case-by-case litigation; second, an intervention/advocacy program; and third, rulemaking.

In the litigation program, the staff is reviewing individual standards and certification matters that may raise antitrust or deception problems. Our basic approach is to focus on cases in which the standards organization or certifier in question has significant market power. For example, when standards are incorporated into building codes, the standards organization that develops the standards acquires considerable market power.

Once a standards or certification organization acquires the market power to inhibit the entry of new competitors or new products, it also becomes responsible for ensuring that its power is not abused.

I want to emphasize again, however, that the exclusion of a potentially competing product is not, by itself, a cause for antitrust concern. In the vast majority of cases the exclusion will be well justified. It is the basis for and the extent of the exclusion that is the focus of our concern. The exclusion should not exceed that which is reasonably necessary to achieve the legitimate goals of the standards or certification organization.

We will not seek to invalidate any standard or certification decision merely because it does not reflect the least restrictive result imaginable or practicable. We are not scientists, and will not attempt to second guess well-founded scientific or technical decisions. When a standards or certification requirement is obviously overbroad and consequently unnecessarily exclusionary, however, the fact that it is arguably related to a legitimate purpose will not be a sufficient justification.

I think one of our recent cases demonstrates the Commission's approach to this area. Last July, the Commission tentatively accepted a consent agreement with the American Society of Sanitary Engineering. The complaint in that case alleged that ASSE had unreasonably restrained trade by refusing to extend standards coverage to an innovative plumbing valve produced by a small business.

The complaint asserted that as a result of ASSE's refusal, sales of the innovative product were unduly restricted in numerous State and local jurisdictions that rely on the ASSE standards.

The consent agreement that we entered into, which is on the public record and not finally adopted as of yet, would preclude ASSE from repeating the prohibited conduct in the future, and also will require certain procedural safeguards for considering future applications.

We also have under investigation several other matters in which complainants have alleged that standards and certification actions have kept small businesses out of the market or deceived consumers. Unfortunately, our investigations are nonpublic so I am not able to be more specific.

The second part of our standards and certification program is what we call advocacy and intervention. This program provides the Commission's views on the competitive and economic implications of Government and private actions involving standards. In particular, the program seeks to encourage Government agencies that rely on product standards to do so in a way that enhances competition and consumer welfare.

For example, we have been on record since the mid 1970's as urging OSHA to adopt the accreditation program that was discussed this morning.

The final prong of our standards activities involves rulemaking. I would like to bring the subcommittee up to date on where we are on that. For clarification, the rulemaking proposal is not yet pending before the Commission. The staff are in the process of developing final recommendations. A brief history will put this into context. In 1978, an initial staff report was published, followed by hearings in 1979. During the hearings over 200 witnesses, some representing small businesses, testified. The accumulated record is over 100,000 pages.

In 1980, the FTC Improvements Act precluded the Commission from continuing to pursue the standards and certification rulemaking on the basis of our section 18 authority, which prohibits unfair and deceptive acts or practices. Therefore, the Commission was presented with the question as to whether they could continue the rulemaking at all. In February 1981, the Commission voted to continue the rulemaking under our 6(g) authority, which deals with unfair methods of competition.

In 1982, the *Hydrolevel* decision was issued by the Supreme Court holding that the standards setting organization involved was liable for the acts of its agent acting with apparent authority. In 1983, a final staff report was published in which the staff concluded, based on an analysis of the record, that industry standards and certification programs have the potential to unreasonably restrain trade. The staff recommended that although the rulemaking record had been closed in 1979 that it be reopened for comment on the impact of the Supreme Court's important decision in *Hydrolevel* and to determine whether the decision had caused standard setting organizations to change their practices.

Following publication of the staff report in 1983 there was significant new comment based on the *Hydrolevel* decision.Currently,

final staff recommendations are being developed and will be forwarded to the Commission in the near future.

In conclusion, I would like to say that we feel that the Federal Trade Commission has a well developed program in the standards and certification area. We have devoted considerable resources in the past to these activities and plan to continue that resource commitment.

I would also emphasize our concern about the problems that small businesses may have involving standards and certification programs, and we certainly will review any complaints that individuals or businesses bring to our attention.

Mr. Chairman, that concludes my brief summary. We would be pleased to answer any questions you may have.

[See appendix A for Ms. Pedersen's prepared statement.]

Mr. BEDELL. Thank you very much, Ms. Pedersen.

Mr. Sisisky.

Mr. SISISKY. You talk about in regard to the Federal Trade Commission, but, of course, it is obvious in a case like this that we heard today—you may have hearings on it, I don't know—but there is not too much you can do. What do you see as a way that the Congress can do something to not prohibit—what I want to do is be sure that we do something without more Government intervention and a lot of businesses that could react back to small business as well as help it.

I raise the issue of certifying a testing laboratory, which to me is a big issue. I just never realized it. I think we have a voluntary program now. But how do you see the Congress doing something without the regulations, but doing it by law, in preventing this type of thing?

Ms. PEDERSEN. I think this is an area where there is a confluence of health and safety concerns and antitrust concerns presenting some very complicated and difficult questions. I also think it is an area where there is a significant amount of change going on right now which makes it quite difficult to target what would be an appropriate remedy.

We have seen in the comments that came in within the last year based on this *Hydrolevel* decision, evidence of a significant amount of change in this area. The one case that I referred to that has become public is a case that is comparable to the situation you have described. It involved toilet valves certified by ASSE. At issue was an innovative valve called the Fillpro valve that worked differently than the ballcock valve that has ASSE certification. Gene may be able to explain to you if you are interested.

The issue in the case was whether ASSE would either write a standard to cover this new kind of valve or bring it in under the standard that exists for ballcock valves. The procedures that ASSE followed according to the complaint were not sufficient in terms of getting to the merits of the issue.

I think the complexity of the area does not readily lend itself to legislation, which is in part why we are pursuing, along with the rulemaking, the case-by-case adjudication method where you have a great deal more flexibility to deal with the complicated economic issues that arise.

Mr. SISISKY. But a case-by-case adjudication is very lengthy and a small business will go out of business by the time you get through with cases on a case-by-case basis. And you are basing mainly on a court decision, or court decisions, rather than basic law. Is that a fair statement?

I mean, you have got your antitrust laws—I understand that.

Ms. PEDERSEN. The Supreme Court's decision was based on common law principles of agency law and found that the standard-setting organization in that instance was responsible for the acts of its agent who had an economic interest in the decision.

You are absolutely right. Litigation can be a long-term process. I do believe, however, that any individual case tends to have a very significant impact in the industry in terms of the kinds of practices.

Mr. SISISKY. Mr. Chairman, I yield back.

Mr. BEDELL. Maybe we can finish here before the vote.

Ms. Pedersen, now I am not—I am like Mr. Sisisky, if I interpret it correctly—willing to say that we are going to wait and see this done on a case-by-case basis with what at least appears to me to be a serious impediment toward opportunities for small business to compete in the marketplace.

It seems to me there are two problems. One occurs in a monopoly that appears to exist in particularly recognized testing agencies. We had Mr. Frier from MET testify on that. He has a testing agency, but the Government says that we recognize the others and we don't recognize his.

This is one of the problems—how we go about checking so that there could be some competition in that area. He also indicated—I don't know if it is right or not—that his fees are significantly lower than some of the others. I don't know if that is right or not, but it would not be surprising, since it appears to me there is a monopoly in those areas.

The second problem is how do we go about making it possible for people to get their products tested? In my opinion, it appears that in this case it has been impossible for this particular firm to get their products tested. And at least, it seems to me, if we are going to have competition, there ought to be that opportunity to have a testing laboratory.

Do you have any suggestions as to how we could address those two issues, because I think that is what this committee is going to have to wrestle with?

Ms. PEDERSEN. Let me just make a couple of points and then I will ask my colleagues to jump in if they have any questions.

Mr. BEDELL. We are very short of time. We have got about 4 mintues.

Ms. PEDERSEN. We don't have jurisdiction over other Federal Government agencies. All we can do on this kind of problem—and we have done it—is to say to OSHA, we think you ought to have an accreditation program. We have pushed them to do so.

Mr. BEDELL. But they could have that?

Ms. PEDERSEN. They have a regulatory scheme that permits them to do that.

Mr. BEDELL. So OSHA could say that MET is authorized to test just the same as Factory Mutual; is that correct?

Ms. PEDERSEN. Yes.

Mr. BEDELL. That would only apply to OSHA; it would not necessarily mean that somebody who had it approved by MET could go out and sell to the oil companies, for example? Or is that incorrect?

Ms. PEDERSEN. There is an organization—and I will ask Gene Curry to jump in a little bit—the Bureau of Standards does have an organization that accredits testing organizations.

Mr. SISISKY. Voluntary—excuse me—it is a voluntary program.

Ms. PEDERSEN. Yes, but what you are dealing with is a lot of State and local authorities who would—if you wanted to set up a company to test—need to agree that you were someone they wanted to rely on. One route to accomplish that would be to do so through the Bureau of Standards accreditation process, which would, in effect give you their seal of approval.

Another way to do it would be to have OSHA's accrediting program give you that seal of approval. You could then perhaps take it to the States and say, look, I am a good testing outfit, OSHA says I am, the Bureau of Standards says I am, you should accept me.

Mr. BEDELL. If the Bureau of Standards certified MET, do you know whether that would make it possible—and they tested and approved Mr. Alexandres battery—do you know whether that would then make it possible for him to effectively compete in the marketplace and sell his battery as compared to Motorola? Or would it still be, since they have Factory Mutual's approval, that he could not effectively sell his battery? Do you know the answer to that?

Ms. PEDERSEN. I don't know the answer to that.

Mr. BEDELL. Maybe he is in the audience. Would it, Mr. Alexandres?

Mr. ALEXANDRES. No.

Mr. BEDELL. OK.

Mr. CURRY. Excuse me, can——

Mr. BEDELL. We are trying to find answers to this problem.

Mr. CURRY. There are really two problems that arise here. One is the requirement by Government agencies that a specific testing laboratory test for compliance with their regulations, as OSHA's current regulations specify Factory Mutual and UL.

Mr. BEDELL. That can be solved, I assume?

Mr. CURRY. Right.

Then there is the whole question of private reliance, which is very, very complex because of the various markets in which parties sell different standards for competing products. There are over 700 standards groups participating in standards development, and over 32,000 standards that are in effect. It is hard to say, without giving a lot of thought to this question—which I really hadn't anticipated before coming here—how we could suggest legislation that would address a problem like Mr. Alexandres in that particular context.

Mr. BEDELL. But your testimony would indicate, if I understand it correctly, that that is not a unique problem which exists only with Factory Mutual and Mine Safety and Health. It appears to exist in other areas as well, in the building trades, and so on, where somebody makes an equivalent product and can't get it approved. Is that correct?

Mr. CURRY. That is correct. We have numerous complaints as to that.

Mr. BEDELL. Are those complaints that they can't even get them tested? Or that they have been tested and found inadequate?

Mr. CURRY. The ASSE complaint is an illustration that they couldn't get the product tested.

Mr. BEDELL. So it is not just here?

Mr. CURRY. That is exactly right. The company, in that situation, had gone to ASSE which has a standard for a particular line of plumbing products. The company couldn't meet the ASSE standard because its product used a different design. They went to an ASSE-approved expert to ask him to develop testing criteria. The expert did so. They went to an ASSE-approved laboratory and asked the laboratory to evaluate the testing criteria; and then assumed that the testing criteria were satisfactory to test their product against the testing criteria. The laboratory approved both. And they still couldn't get ASSE to approve their product.

Mr. BEDELL. We do have to go vote.

Ms. PEDERSEN. Mr. Chairman, we certainly could consider this and if we could be of assistance to you.

Mr. BEDELL. If you have any suggestions as to how this problem could be solved, we would appreciate hearing them. I do not believe this subcommittee, in this person's judgment, is going to be willing to forget this issue. I believe this subcommittee is going to want to do something to correct this, and I perceive that the members that have been in attendance feel that there is a serious problem, and they are not going to sit by and not do something.

We would prefer to do it in the most logical, simple, nonbureaucratic way that it can be done. But I don't think we are going to sit by and let anybody who appears to have a monopoly tell somebody, look, we are not going to test your product, it doesn't matter how good it is, or what you sell it for, you can't, in effect, sell it. I don't believe we are going to let that happen.

Ms. PEDERSEN. We have a great deal of institutional expertise in this area, and we would be happy to share it with you.

Mr. BEDELL. We would appreciate it if you could do anything on that.

Mr. BEDELL. Before we adjourn, I think the Factory Mutual people are here, I want it clearly understood. If I understood it correctly, we had requested of you that you furnish us the records of when in the last 4 years you have tested those four models of Motorola radios. And also a list, at least, of your 10 top largest clients in terms of their payments to you in 1983. Is that correct?

Mr. REED. Yes.

[The information referred to above can be found on pp. 79 and 83.]

Mr. BEDELL. Great. Is there anything more, Mr. Sisisky?

Mr. SISISKY. No, Mr. Chairman.

Mr. BEDELL. We appreciate your time very much, and thank you. The hearing is is adjourned.

[Whereupon, at 1:55 p.m., the subcommittee adjourned, to reconvene subject to call of the Chair.]

41-341 O - 85 - 4

APPENDIX

PREPARED STATEMENT OF AMANDA B. PEDERSEN, DEPUTY DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

Introduction

Mr. Chairman and members of the Subcommittee: Thank you for inviting me here today to discuss product standards and their impact on small business. The Commission has been examining the market-place effects of private standards and certification programs since the early 1970's. We welcome the opportunity to share our learning. Standards and certifications play a critical role in the economy. They help to ensure an efficient flow of goods and services to consumers and to protect health and safety. Sometimes, however, they can cause antitrust or consumer protection problems.

Today I would like to discuss the standards and certification industry, government reliance on industry standards, the problems resulting from government reliance, and finally, Commission activities in this area. These have included an industry-wide rulemaking proceeding, case-by-case litigation, and a variety of advocacy activities before governmental agencies.

The Standards and Certification Industry

Standards prescribe material, production, design, installation, safety or performance characteristics of products. They are developed by organizations that bring together committees of individuals knowledgeable in specific product areas. Often, these committees are composed primarily of manufacturers or sellers of the products covered by the

standard. Participation by industry members is usually essential since they provide the knowledge and financial resources necessary to develop standards. As a result, industry members can exert a powerful influence over standards decisions.

Certification is the process by which a specific product is tested against a standard and the results reported. The testing of electrical products by Underwriters' Laboratories is a familiar example. Certification permits manufacturers and sellers of products to demonstrate efficiently that their products comply with relevant standards. Certification organizations may be funded by or otherwise associated with specific industry groups or trade associations. By controlling access to certification, such groups or associations can have a powerful impact on the marketing of particular products.

Standards developers and certifiers are able to influence markets because of the extensive reliance by government, purchasers, and others on private standards and certification programs. Their influence was recognized by the Supreme Court in

American Soc'y of Mechanical Eng'rs v. Hydrolevel,[1] in which the Court described the American Society of Mechanical Engineers ("ASME") in the following manner:

> ASME wields great power in the economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretation of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as an entire segment of an industry.[2]

In general, standards and certification programs provide significant competitive benefits. Perhaps the most significant benefit is reducing transaction costs by facilitating communication between buyers and sellers about complex product attributes. Other benefits include easing the introduction of new technology by enabling innovative manufacturers to

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[1] 456 U.S. 556 (1982). The case involved the use of an interpretation of the ASME Boiler and Pressure Vessel Code to injure Hydrolevel, which produced an innovative boiler safety device. An ASME member, who was employed by one of Hydrolevel's competitors, wrote an interpretation of the Code that falsely implied that Hydrolevel's device did not meet the code. Hydrolevel's competitor used the interpretation to disparage the Hydrolevel product. The case went to the Supreme Court on the question of whether ASME was liable for the actions of its agents acting with apparent authority. The Court held that ASME was liable for the anticompetitve actions of its agent.

[2] Id. at 570.

demonstrate the safety or efficiency of new products, enhancing consumer confidence by setting minimum quality and safety levels, and reducing production and distribution costs by eliminating superfluous product varieties.

Governmental Reliance on Private Standards

Government agencies rely on private standards and certification programs because reliance is an efficient and practical way for using existing private sector expertise. If government agencies did not rely on private standards and certification programs, they would have to spend considerable time and money to duplicate them. Numerous federal agencies adopt or refer to private standards for regulatory and procurement purposes. For example, the Occupational Safety and Health Administration relies heavily on private standards in its regulation of workplace safety. Similarly, the Department of Defense refers to more than 3,300 private standards in its procurement documents. Even agencies that have in-house technical expertise, such as the Nuclear Regulatory Commission, rely on private standards. Other federal agencies that rely on private product standards include the Department of Commerce, the Federal Housing Authority, the Consumer Product Safety Commission, the Food and Drug Administration, and the Department of Energy.

Federal reliance on private standards programs is likely to increase. OMB Circular A-119, "Federal Participation in the

Development and Use of Voluntary Standards,"[3] establishes a policy preference in favor of the use of private standards and certifications by federal agencies. The purpose of the Circular is to increase government efficiency by reducing the costs of in-house standards development.

Many state and local jurisdictions also extensively rely on private standards. In many cases, these jurisdictions do not have the resources to undertake independent evaluations of the health and safety performance of the wide variety of products available for sale in their jurisdictions. Reliance upon the expertise of standards developers generally constitutes a cost-effective means of protecting health and safety. In some cases, states or cities directly incorporate private standards into their codes. More frequently, states or cities indirectly adopt standards into law by adopting model codes. Model codes are compilations of private standards organized into the format of building codes for adoption by state and local legislatures.[4]

Federal regulations or local building codes often require laboratory "approval" or "listing." Where federal or state regulations require laboratory approval, the reference may be either to a general category of laboratories or to a specified

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[3] 47 Fed. Reg. 49496 (Nov. 1, 1982). A copy of the Circular is appended as Attachment 1.

[4] Even when private standards and certification requirements are not incorporated into government regulatory or procurement activity, there is extensive reliance on product standards by manufacturers, architects, retailers, insurers, and private purchasers.

laboratory. For example, certain Occupational Safety and Health Administration ("OSHA") standards for electrical safety specifically name Underwriters' Laboratories and Factory Mutual Engineering Corporation as the only acceptable certifiers.

Potential Problems From Government Reliance on Standards

I emphasize that reliance by government agencies on private standards and certifications is not a source of concern in itself. Although these programs exclude products that do not meet their requirements, and often involve collective activity among competitors -- something that is suspect in many antitrust contexts -- these programs are generally beneficial for consumers. Government reliance on standards developers and certifiers is usually economical and well-founded.

Nevertheless, it must be remembered that the standards and certification process may present opportunities for illegal conduct to industry participants who have a commercial interest in the outcome of the process. Because of their technical expertise, industry participants may be in a position to exercise a disproportionate and unreasonable influence in the standards and certification process to inhibit innovation, restrict entry into their market or mislead consumers. When this occurs, there is injury to competition and consumers. Further, when a government agency is, in effect, enforcing an anticompetitive or misleading standard, the injury to competition and consumers is that much greater. Similarly, the unreasonable refusal of a

certifier to approve products can be devastating to a business when approval by that laboratory has become mandatory.

In addition, government selection of a particular standard as a basis for regulation, or of a particular certifier to evaluate compliance with its regulations, can have a significant competitive impact. Unless government agencies are sensitive to the competitive implications of their actions, and take steps to minimize any resulting adverse competitive impact, their reliance on standards and certification may unnecessarily harm competition and consumers.

For example, OSHA's specification of only two laboratories as competent to test for compliance with its regulations appears to have unnecessarily reduced competition. Competing laboratories have claimed that this has resulted in their virtual exclusion from the market for OSHA compliance testing, despite efforts for several years to enter this testing market. During OSHA's recent review of its laboratory accreditation procedures, the FTC submitted formal comments to OSHA advocating measures to erase these barriers to competition. OSHA has proposed procedures to do so after concluding that the exclusion of competing laboratories may have resulted in unnecessarily high prices for testing and excessive delays in getting products tested and certified.

Small businesses may be particularly affected by government or private unreasonable standards and certification decisions. Participation in standards development and certification

activities can require a significant commitment of resources over long periods of time. For example, effective participation in standards activities might require providing engineering staff, travel expenses, and laboratory facilities. A large company with several product lines covered by a committee may find it easier than a small business to justify spending its resources on these items. As a result, the interests of small businesses may not always be represented. Similarly, unlike a large company having many products certified annually, a small business may not have an ongoing financial relationship with a certifier. Thus, the small business may be more vulnerable to arbitrary action by a certifier. Finally, small businesses may not always have the resources to challenge an adverse standards or certification action.

Federal Trade Commission Activities In The Standards and Certification Area

The Federal Trade Commission's efforts in this area have been aimed at protecting consumers and competition without disrupting the beneficial activities of standards developers and certifiers. The Commission's activities are divided into three areas: an industry-wide rulemaking; case-by-case litigation; and an intervention/advocacy program.

1. Rulemaking

The purpose of the rulemaking proceeding is to identify any industry-wide unfair methods of competition that may exist among standards developers or certifiers. Approximately 200 witnesses participated in the rulemaking, including many small businesses. In April of 1983, the Bureau of Consumer Protection published a Final Staff Report[5] in which the staff concluded, based on an analysis of a 100,000 page record, that industry standards and certification activities have the potential to, and do in fact on occasion, unreasonably restrain trade or otherwise injure competition and consumers. The staff recommended that the Commission address the antitrust and consumer protection problems found in the rulemaking record by bringing individual cases where appropriate. The staff further recommended that the Commission promulgate a rule to remedy a perceived failure of standards developers to handle complaints that their standards unreasonably restrain trade. Finally, the staff requested that the rulemaking record be reopened to determine whether events that took place after the close of the record, such as the Hydrolevel decision, may have prompted standards developers to change their complaint handling procedures. The staff is now preparing final recommendations based on its review of comments from the public on their recommendations. The comments include new evidence

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[5] A copy of the Staff Report, the Presiding Officer's Report, and the Statement of Timothy J. Muris, then Director of the Bureau of Consumer Protection, have already been provided to the Committee.

concerning changes in standards developer procedures since the close of the rulemaking record. The staff is now evaluating the comments and formulating final recommendations to the Commission.

2. Case-by-Case Litigation

While the rulemaking proceeding is continuing, the staff of the Bureaus of Consumer Protection and Competition are reviewing additional standards and certification matters that may raise antitrust or deception problems. Our basic approach is to focus on cases in which the standards organization or certifier in question has significant market power. For example, when standards are incorporated into building codes, the standards organization that develops the standards acquires considerable market power.

Once a standards or certification organization acquires the market power to inhibit the entry of new competitors or new products, it also becomes responsible for ensuring that its power is not abused. I want to emphasize again, however, that exclusion of a potentially competing product is not, by itself, a cause for antitrust concern. In the vast majority of cases, the exclusion will be well justified. It is the basis for and extent of the exclusion that is the focus of our concern. The exclusion should not exceed that which is reasonably necessary to achieve the legitimate goals of the standards or certification organization.

We will not seek to invalidate any standard or certification

decision merely because it does not reflect the "least restrictive" result imaginable or practicable. We are not scientists, and will not attempt to second guess well-founded scientific or technical decisions. When a standards or certification requirement is obviously overbroad and consequently unnecessarily exclusionary, however, the fact that it is arguably related to a legitimate purpose will not be sufficient justification. Finally, we do not believe that standards developers or certifiers should be exempt from antitrust liability simply because governmental bodies have adopted their requirements.

One recent case demonstrates the Commission's commitment and approach to effective action in this area. On July 26 of this year, the Commission accepted, subject to final approval, a consent agreement with the American Society of Sanitary Engineering (ASSE).[6] The complaint, published with the consent agreement, alleged that ASSE had unreasonably restrained trade by refusing to extend standards coverage to an innovative plumbing valve produced by a small business. The complaint asserted that, as a result of ASSE's refusal, sales of the innovative product were unduly restricted in numerous state and local jurisdictions

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[6] The consent agreement has been accepted subject to final approval in accordance with the Commission's Rules of Practice. Under the Rules, after consent agreements are accepted by the Commission, they are placed on the public record for sixty days for comment. After analysis and consideration of all comments, the Commission will decide whether to make the agreement final. The comment period for the ASSE consent agreement will close on October 13, 1984. A copy of the consent agreement is appended as Attachment II.

that rely on ASSE standards.

We are also investigating a number of additional matters in which complainants have alleged that standards and certifications have kept small businesses out of the market or deceived consumers. However, the nonpublic nature of our investigations prevents disclosing specific details.

3. Advocacy and Intervention

The Commission also has an advocacy and intervention program that provides the Commission's views on the competitive and economic implications of government and private actions involving standards. In particular, the program seeks to encourage government agencies that rely on product standards to do so in a way that enhances competition and consumer welfare.

The Commission has successfully influenced government-wide policy concerning standards and certification through participation in the Interagency Committee on Standards Policy ("ICSP"). As a member of ICSP, the Commission assisted in the creation of the OMB Circular A-119, discussed earlier, which governs reliance by federal agencies on voluntary standards. As a result of the Commission's staff participation, the Circular contains cautionary language warning agencies about antitrust and consumer protection problems that might arise from agency reliance on standards.

Recently, the Commission also filed comments with the

Consumer Product Safety Commission ("CPSC"), urging CPSC to revise a proposed amendment to its rules by which CPSC would endorse specific voluntary standards.[7] The Commission urged that the amendment not be adopted unless it was revised to avoid reducing competition and deterring innovation. As discussed earlier, the Commission has also commented on the development of OSHA regulations relating to testing laboratory accreditation, strongly encouraging OSHA to develop accreditation criteria that would improve competition in product testing markets.[8]

The Bureau of Consumer Protection has also co-sponsored several projects aimed at improving the building regulatory process. One of these projects is developing models of efficient and effective code administration for use by states that are attempting to speed up the building permit and approval process. Another project is examining the building products approval process in order to find ways to speed up the evaluation and approval of innovative building products and methods.

Finally, the Commission joined the Department of Justice in filing an amicus brief in American Soc'y of Mechanical Engr's v. Hydrolevel, discussed previously. The Court's majority opinion reflects agreement with many of the points urged in the government's amicus brief.

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[7] A copy of the Commission's comments to CPSC is appended as Attachment III.

[8] A copy of the Commission's comments to OSHA is appended as Attachment IV.

Conclusion

In conclusion, the Federal Trade Commission has a well-developed program of action in the standards and certification area. We have devoted considerable resources in the past to these activities and plan to continue this resource commitment. I would also emphasize that the Commission is concerned about the problems that small businesses may have involving standards and certification programs and we will review any complaints that individuals or business bring to our attention.

Mr. Chairman and members of the Subcommittee: that completes my prepared remarks. I am pleased to address any questions you may have.

held November 15, 1982, from 9:00 a.m. to 5:00 p.m. and November 16 to 20, 1982 from 9:00 a.m. to 5:30 p.m., in the 11th floor reception area of the Columbia Plaza Office Complex, 2401 E Street, NW., Washington, D.C., 20506.

This meeting is for the purpose of panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the Federal Register of February 13, 1980, these sessions will be closed to the public pursuant to subsections (c)(4), (6) and 9(b) of section 552b of Title 5, United States Code.

Further information with reference to this meeting can be obtained from Mr. John H. Clark, Advisory Committee Management Officer, National Endowment for the Arts, Washington, D.C. 20506, or call (202) 634-6070.

John H. Clark,

Director, Office of Council and Panel Operations, National Endowment for the Arts.

October 28, 1982.

[FR Doc. 82-30331 Filed 10-29-82; 8:45 am]

BILLING CODE 7537-01-M

OFFICE OF MANAGEMENT AND BUDGET

Issuance of Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Standards"

AGENCY: Office of Management and Budget.

ACTION: Final issuance of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Standards."

SUMMARY: This OMB Circular provides policy and administrative guidance to Federal agencies on using voluntary standards for procurement and regulatory purposes, on participating with private sector organizations to develop such standards, and coordinating Executive Branch participation in the development of voluntary standards. Implementation of this Circular is expected to result in reduced costs to the Government in developing and maintaining standards for products, systems and services.

EFFECTIVE DATE: This Circular, which supersedes OMB Circular No. A-119, dated January 17, 1980, is effective upon publication.

FOR FURTHER INFORMATION CONTACT: David F. Baker, Office of Federal Procurement Policy, Office of Management and Budget, Washington, DC 20503 (202) 395-7207.

SUPPLEMENTARY INFORMATION: On April 21, 1982, the Office of Management and Budget published a draft Circular, subject as above, for a 60-day period of public and agency comment. Comments were received from more than 120 individuals and organizations, including Federal agencies, business firms, industry associations, professional groups and private citizens.

There follows a summary of the major comments grouped by subject and a response to each—including a brief description of changes made as a result of the comments. Many other changes of a less significant character were made to increase clarity, simplicity, precision and readibility, and to reduce the burdens of compliance as much as possible.

A. Procedural Criteria Imposed on Standards Developers

Comment: Several commenters objected to OMB's deletion of specific procedural criteria which the previous version of the Circular imposed on voluntary standards bodies as a precondition to Federal participation. They argued that such criteria—intended to increase public participation and openness—would help to minimize the potential for anti-trust activities. Other commenters suggested that while such procedures should not be mandatorily imposed, OMB should instruct agencies to encourage private standards developers to follow such procedures.

Response: With regard to the inclusion of procedural criteria and their mandatory imposition on standard developers, we have concluded that imposition of the mandatory procedures contained in the previous edition of the Circular is inappropriate, burdensome and costly and that the question of imposing such criteria is peripheral to the fundamental aims of the Circular. We do agree that, as with any human endeavor, the voluntary standards development process is vulnerable to abuse. Consequently, we have cautioned Federal agencies to beware of such potential (Para. 7). We have also provided guidance to agencies in the form of a letter from the Department of Justice, dated June 22, 1982, which discusses suggested agency approaches to the question of public participation in private sector standards development.

B. Regulatory Applications

Comment: Some commenters suggested that the Circular should be limited to procurement applications, and that Federal agencies should not be required to use voluntary standards for regulatory purposes. Some commenters suggested, in addition, that the Circular should not apply to "independent regulatory agencies".

Response: We believe the benefits to be derived from the procurement use of standards are equally valid for regulatory applications—particularly the benefits of assuring private sector input into Federal regulatory activities while reducing the potential for duplicating existing, adequate voluntary standards with Government standards. With regard to the second concern, the Circular does not "require" Federal agencies to use voluntary standards for regulatory purposes. It establishes a policy preference in that regard but leaves to the agencies, themselves, the decision as to whether to adopt a given voluntary standard for a specific Federal regulatory purpose. (The legal requirements associated with such adoption, such as those of the Administrative Procedures Act, will, of course, continue to apply.) We believe such an approach is entirely appropriate with respect to independent regulatory agencies as with the rest of the Executive Branch.

C. Role of the Department of Commerce

Comment: Several commenters objected to the requirements that the Department of Commerce maintain listings of (1) voluntary and Government standards, (2) voluntary standards bodies, and (3) those standards organizations with which Federal agencies interact—on the grounds that this would result in extensive and costly reporting requirements. Other commenters suggested that the agency reporting requirements contained in the Circular were, themselves, overly burdensome.

Response: We agree. The requirements to maintain various listings have been eliminated. The provisions dealing with reports on agency implementation of the Circular have been revised to require that reports be summary, as opposed to detailed, in nature.

D. Voluntary Dispute Resolution Service

Comment: Some commenters objected to our deletion of the requirement that the Department of Commerce establish a program to make available a "voluntary dispute resolution service" to handle procedural complaints brought by

interested parties against voluntary standards bodies. Those commenters suggested that such a mechanism would provide an impartial means of resolving standards disputes without costly and lengthy litigation.

Response: While we take no position on the substantive merits of such a mechanism, we are satisfied that the requirement to establish such a service is not an appropriate element for inclusion in this Circular. Agencies with mission concerns in this area (e.g. Commerce, Justice, etc.) may, of course, consider establishing such a service as it is within their province to do so. The creation of the mechanism is clearly peripheral to the policy issues dealt with in the Circular, however, which are limited to Federal participation in the development and use of voluntary standards.

E. Single Federal Position

Comment: Many commenters suggested that the provisions of the Circular that required agencies to coordinate their views and express a single Federal position in private sector standards development activities were unnecessary and unworkable—and that establishment of a mechanism to achieve these purposes would be costly and lead to lengthy delays in the standards development process.

Response: We continue to believe that agencies should endeavor to coordinate their views and present single Federal positions in matters of paramount importance. We agree, however, that the requirement to do so in all such instances is unreasonable and could lead to bureaucratic delays. Consequently, we have eliminated the requirement that Federal positions must be developed in all instances, as well as those provisions which would have required the Secretary of Commerce to appoint a "lead" agency when disagreements as to the nature of the Government's position occurred on a given issue. We continue to expect agency representatives to make a reasonable effort to present a single Federal position reflective of the public interest on matters on paramount interest in those standards activities wherein two or more agencies participate.

Candice C. Bryant,

Acting Deputy Assistant Director for Administration.

Executive Office of the President

Office of Management and Budget

October 28, 1982.

Memorandum to Heads of Executive Departments and Agencies

From: David A. Stockman

Subject: OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Standards"

Attached, for your implementation, is a revision to OMB Circular No. A-119 which provides guidance to agencies in working with, and using the products of, private sector standards organizations. The effect of this revision is to eliminate the costly, unnecessary, and burdensome aspects of the Circular, while continuing to encourage agency participation in the development of private sector standards.

Also attached for your information and use is a letter, dated June 22, 1982, from the Department of Justice, which provides guidance in the implementation of the Circular—particularly as it relates to working with private sector groups to develop needed standards.

Executive Office of the President

Office of Management and Budget

October 28, 1982.

Circular No. A-119—Revised

To the Heads of Executive Departments and Establishments

Subject: Federal Participation in the Development and Use of Voluntary Standards

1. *Purpose.* This Circular establishes policy to be followed by executive agencies in working with voluntary standards bodies. It also establishes policy to be followed by executive branch agencies in adopting and using voluntary standards.

2. *Rescissions.* This Circular supersedes OMB Circular No. A-119, dated January 17, 1980, which is rescinded.

3. *Background.* Many Governmental functions involve products or services that must meet reliable standards. Many such standards, appropriate or adaptable for the Government's purposes, are available from private voluntary standards bodies. Government participation in the standards-related activities of these voluntary bodies provides incentives and opportunities to establish standards that serve national needs, and the adoption of voluntary standards, whenever practicable and appropriate, eliminates the cost to the Government of developing its own standards. Adoption of such standards also furthers the policy of reliance upon the private sector to supply Government needs for goods and services, as enunciated in OMB Circular No. A-76.

4. *Applicability.* This Circular applies to all executive agency participation in voluntary standards activities, domestic and international, but not to activities carried out pursuant to treaties and international standardization agreements.

5. *Definitions.* As used in this Circular:

a. *Executive agency* (hereinafter referred to as "agency") means any executive department, independent commission, board, bureau, office, agency, Government-owned or—controlled corporation or other establishment of the Federal Government, including regulatory commission or board. It does not include the legislative or judicial branches of the Federal Government.

b. *Standard* means a prescribed set of rules, conditions, or requirements concerned with the definition of terms; classification of components; delineation of procedures; specification of dimensions, materials, performance, design, or operations; measurement of quality and quantity in describing materials, products, systems, services, or practices; or descriptions of fit and measurement of size.

c. *Voluntary standards* are established generally by private sector bodies and are available for use by any person or organization, private or governmental. the term includes what are commonly referred to as "industry standards" as well as "consensus standards", but does not include professional standards of personal conduct, institutional codes of ethics, private standards of individual firms, or standards mandated by law, such as those contained in the United States Pharmacopeia and the National Formulary, as referenced in 21 U.S.C. 351.

d. *Government standards* include individual agency standards and specifications as well as Federal and Military standards and specifications.

e. *Voluntary standards bodies* are private sector domestic or multinational organizations—such as nonprofit organizations, industry associations, professional and technical societies, institutes, or groups, and recognized test laboratories—that plan, develop, establish, or coordinate voluntary standards.

f. *Standards-developing groups* are committees, boards, or any other principal subdivisions of voluntary standards bodies, established by such bodies for the purpose of developing, revising, or reviewing standards, and which are bound by the procedures of those bodies.

g. *Adoption* means the use of the latest edition of a voluntary standard in whole, in part, or by reference for procurement purposes and the inclusion of the latest edition of a voluntary standard in whole, in part, or by reference in regulation(s).

h. *Secretary* means the Secretary of Commerce or that Secretary's designee.

6. *Policy.* It is the policy of the Federal Government in its procurement and regulatory activities to:

a. Rely on voluntary standards, both domestic and international, whenever feasible and consistent with law and regulation pursuant to law;

b. Participate in voluntary standards bodies when such participation is in the public interest and is compatible with agencies' missions, authorities, priorities, and budget resources; and

c. Coordinate agency participation in voluntary standards bodies so that (1) the most effective use is made of agency resources and representatives; and (2) the views expressed by such representatives are in the public interest and, as a minimum, do not conflict with the interests and established views of the agencies.

7. *Policy Guidelines.* In implementing the policy established by this Circular, agencies should recognize the positive contribution of standards development and related activities.

When properly conducted, standards development can increase productivity and efficiency in industry, expand opportunities for international trade, conserve resources, and improve health and safety. It also must be recognized, however, that these activities, if improperly conducted, can suppress free and fair competition, impede innovation and technical progress, exclude safer and less expensive products, or otherwise adversely affect trade, commerce, health, or safety. Full account shall be taken of the impact on the economy, applicable Federal laws, policies, and national objectives, including, for example, laws and regulations relating to antitrust, national security, small business, product safety, environment, technological development, and conflicts of interest. It should also be noted, however, that the provisions of this Circular are intended for internal management purposes only and are not intended to (1) create delay in the administrative process, (2) provide new grounds for judicial review, or (3) create legal rights enforceable against agencies or their officers. The following policy guidelines are provided to assist and govern implementation of the policy enunciated in paragraph 6.

a. *Reliance on Voluntary Standards.* (1) Voluntary standards that will serve agencies' purposes and are consistent with applicable laws and regulations should be adopted and used by Federal agencies in the interests of greater economy and efficiency, unless they are specifically prohibited by law from doing so.

(2) Voluntary standards should be given preference over non-mandatory Government standards unless use of such voluntary standards would adversely affect performance or cost, reduce competition, or have other significant disadvantages. Agencies responsible for developing Government standards should review their existing standards at least every five years and cancel those for which an adequate and appropriate voluntary standard can be substituted.

(3) In adopting and using voluntary standards, preference should be given to those based on performance criteria when such criteria may reasonably be used in lieu of design, material, or construction criteria.

(4) Voluntary standards adopted by Federal agencies should be referenced, along with their dates of issuance and sources of availability, in appropriate publications, regulatory orders, and related in-house documents. Such adoption should take into account the requirements of copyright and other similar restrictions.

(5) Agencies should not be inhibited, if within their statutory authorities, from developing and using Government standards in the event that voluntary standards bodies cannot or do not develop a needed, acceptable standard in a timely fashion. Nor should the policy contained in this Circular be construed to commit any agency to the use of a voluntary standard which, after due consideration, is, in its opinion, inadequate, does not meet statutory criteria, or is otherwise inappropriate.

b. *Participation in Voluntary Standards Bodies.* (1) Participation by knowledgeable agency employees in the standards activities of voluntary standards bodies and standards-developing groups should be actively encouraged and promoted by agency officials when consistent with the provisions of paragraph 6b.

(2) Agency employees who, at Government expense, participate in standards activities of voluntary standards bodies and standards-developing groups should do so as specifically authorized agency representatives.

(3) Agency participation in voluntary standards bodies and standards-developing groups does not, of itself, commit agency agreement with, or endorsement of, decisions reached by such bodies and groups or of standards approved and published by voluntary standards bodies.

(4) Participation by agency representatives should be aimed at contributing to the development of voluntary standards that will eliminate the necessity for development or maintenance of separate Government standards.

(5) Agency representatives serving as members of standards-developing groups should participate actively and on a basis of equality with private sector representatives. In doing so, agency representatives should not seek to dominate such groups. Active participation is intended to include full involvement in discussions and technical debates, registering of opinions and, if selected, serving as chairpersons or in other official capacities. Agency representatives may vote, in accordance with the procedures of the voluntary standards body, at each stage of standards development, unless specifically prohibited from doing so by law or their agencies.

(6) The number of individual agency participants in a given voluntary standards activity should be kept to the minimum required for effective presentation of the various program, technical, or other concerns of Federal agencies.

(7) The providing of Agency support to a voluntary standards activity should be limited to that which is clearly in furtherance of an agency's mission and responsibility. Normally, the total amount of Federal support should be no greater than that of all private sector participants in that activity except when it is in the direct and predominant interest of the Government to develop a standard or revision thereto and its development appears unlikely in the absence of such support. The form of agency support, subject to legal and budgetary authority, may include:

(a) Direct financial support; e.g., grants, sustaining memberships, and contracts;

(b) Administrative support; e.g., travel costs, hosting of meetings, and secretarial functions;

(c) Technical support; e.g., cooperative testing for standards evaluation and participation of agency personnel in the activities of standards-developing groups; and

(d) Joint planning with voluntary standards bodies to facilitate a coordinated effort in identifying and developing needed standards.

(8) Participation by agency representatives in the policymaking process of voluntary standards bodies, in accordance with the procedures of those bodies, is encouraged—particularly in matters such as establishing priorities, developing procedures for preparing, reviewing, and approving standards, and creating standards-developing groups. In order to maintain the private, nongovernmental nature of such bodies, however, agency representatives should refrain from decisionmaking involvement in the internal day-to-day management of such bodies (e.g., selection of salaried officers and employees, establishment of staff salaries and administrative policies).

(9) This Circular does not provide guidance concerning the internal operating procedures that may be applicable to voluntary standards bodies because of their relationships to agencies under this Circular. Agencies should, however, carefully consider what laws or rules may apply in particular instance because of these relationships. For example, these relationships may involve the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), or a provision of an authorizing statute for a particular agency. Agencies should be able to determine what laws and policies should govern particular relationships and to assess the extent to which competition may be enhanced and cost-effectiveness increased. Questions relating to anti-trust implications of such relationships should be addressed to the Attorney General.

8. *Responsibilities.* a. The Secretary will:

(1) Coordinate and foster executive branch implementation of the policy in paragraph 6 of this Circular, and may provide administrative guidance to assist agencies in implementing paragraph 6.b. (3) of this Circular;

(2) Establish an interagency consultative mechanism to advise the Secretary and agency heads in implementing the policy contained herein. That mechanism shall provide for participation by all affected agencies and ensure that their views are considered; and

(3) Report to the Office of Management and Budget concerning implementation of this Circular.

b. The heads of agencies concerned with standards will:

(1) Implement the policy in paragraph 6 of this Circular in accordance with the policy guidelines in paragraph 7 within 120 days of issuance;

(2) Establish procedures to ensure that agency representatives participating in voluntary standards bodies and standards-developing groups will, to the extent possible, ascertain the views of the agency on matters of paramount interest and will, as a minimum, express views that are not inconsistent or in conflict with established agency views;

(3) Endeavor, when two or more agencies participate in a given voluntary standards body or standards-developing group, to coordinate their views on matters of paramount importance so as to present, whenever feasible, a single unified position.

(4) Cooperate with the Secretary in carrying out his responsibilities under this Circular; and

(3) Consult with the Secretary, as necessary, in the development and issuance of internal agency procedures and guidance implementing this Circular, and submit, in response to the request of the Secretary, summary reports on the status of agency interaction with voluntary standards bodies.

9. *Reporting Requirements.* Three years from the date of issuance of this Circular, and each third year thereafter, the Secretary will submit to the Office of Management and Budget a brief summary report on the status of agency interaction with voluntary standards bodies. As a minimum, the report will include the following information.

a. The nature and extent of agency participation in the d. elopment and utilization of voluntary standards; and

b. An evaluation of the effectiveness of the policy promulgated in this Circular and recommendations of change.

10. *Policy Review.* The policy contained in this Circular shall be reviewed for effectiveness by the Office of Management and Budget three years from the date of issuance.

11. *Inquiries.* For information concerning this Circular, contact the Office of Management and Budget, Office of Federal Procurement Policy, telephone 202/395-7207.

David A. Stockman,
Director.

Department of Justice

Antitrust Division

Office of the Assistant Attorney General

June 22, 1982.

Mr. Donald E. Sowle,
Administrator for Federal Procurement Policy
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Sowle: I am writing to express the views of the Department of Justice on competition policy issues raised by the Revised OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Standards" published for comment in the Federal Register on April 29, 1982 (47 Fed. Reg. 18, 919).

In our comments on previous drafts of the Circular, dated December 26, 1978 and June 15, 1979, we have supported a policy of federal adoption of privately developed standards when appropriate. Through participation in, and support for, private standards making activities, agencies may benefit greatly from private expertise and will avoid the wasteful duplication of cost and effort involved in developing their own in-house standards. The Department of Justice is not opposed to the policy announced in Revised OMB Circular A-119, which would eliminate the rigid "due process" precondition to federal participation in private standards activities. Such a precondition is overly restrictive, since as a practical matter federal agencies will often be required to adopt the standards developed regardless of federal participation in their development. Thus, in our view, the better solution is to participate in standards setting bodies and work within them to assure that appropriate procedures are adopted.

The Department believes that federal participants should encourage the adoption of procedures to foster access to standard setting activities and transparency in such activities. Such procedures facilitate the development of standards acceptable to the entire affected industry as well as to consumers. In particular, notice and opportunity for comment help assure that standards will be based on adequate information as to their utility and consequences. Moreover, it is especially important that performance criteria be given a prominent, perhaps predominant, place in any standards activity. Federal agency representatives, therefore, should advocate, as strongly as possible, procedures designed to assure that a broad range of information is solicited, and that performance criteria are central elements of the resulting standards.

In addition to the practical advantages of open standards proceedings, such safeguards would mitigate the substantial anticompetitive potential inherent in private standards groups. The importance of assuring adequate consideration of competition in the work of private standards bodies was noted recently by the Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* The case involved a product standard which had been adopted in 46 states and all but one of the Canadian provinces. The Court observed that organizations creating such standards could be "rife with opportunities for anticompetitive activity." Federal agencies ought to strongly encourage these private groups to assure consideration of all relevant viewpoints and interests including those of consumers, and potential or existing industry participants.

This country's international obligations and policy, as expressed in the Standards Code negotiated during the Tokyo Round of the Multilateral Trade Negotiations, *see* the Agreement on Technical Barriers to Trade, codified at 19 U.S.C.A. 2531 *et seq.* (1980), provide another important reason for federal agency participants to encourage the adoption of open procedures for private standards groups. This Code, approved by Congress as well as by our leading trading partners, seeks to prevent the creation of product standards which discriminate against import competition. It requires central governmental bodies to provide notice and opportunity to comment in their own standards making activities, and encourages governments to take reasonable measures to ensure that non-governmental bodies provide similar protection. Where the federal government is in fact involved in the private group, the obligations of the Standards Code would appear even stronger. Open procedures, specifically adequate notice and opportunity to comment, would further the objectives of the Standards Code, and would substantially reduce the possibility that discriminatory, anticompetitive standards will be developed.

The Circular would encourage use of voluntary standards for regulatory and other purposes. Although we applaud this expansion of the scope of the Circular, we believe that broadened federal use of privately developed standards should be accompanied with broad federal awareness of the practical and competitive advantages of industry-wide access to private standards bodies. Such access is an asset to federal participation in private standards activities, but it is also of great importance when federal agencies, without participation in the process, merely adopt standards for procurement or regulatory use.

As we indicated in our previous comments, private activity is not, by virtue of governmental participation or approval, shielded from the antitrust laws. Federal agency participation in a standards body, however, may imply federal approval of the process and of the resulting standard, and perhaps lead private participants to become lax in their own antitrust scrutiny. To dispel any false impressions, federal agency representatives should inform private participants that federal participation does not remove antitrust concerns, as well as advocate that appropriate procedures be employed in the standards proceedings.

Sincerely yours,

Ronald G. Carr,
Acting Assistant Attorney General, Antitrust Division.

[FR Doc. 82-30267 Filed 10-29-82; 8:45 am]
BILLING CODE 3110-01-M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. 12798; 812-5368]

Daily Tax Free Income Fund, Inc.; Filing of an Application

October 18, 1982.

Notice is hereby given that Daily Tax Free Income Fund, Inc., 100 Park Avenue, New York, N.Y. 10017 (the "Applicant"), registered under the Investment Company Act of 1940 ("Act") as an open-end, diversified, management investment company, filed an application on August 9, 1982, and an amendment thereto on October 18, 1982, requesting an order of the Commission, pursuant to Section 6(c) of the Act, exempting Applicant and any additional separate portfolios that may be established by Applicant in the future, from the provisions of Section 2(a)(41) of the Act and Rules 2a-4 and 22c-1 under the Act to the extent necessary to permit Applicant to value its assets using the amortized cost method of valuation. All interested persons are referred to the application on file with the Commission for a statement of the representations contained therein, which are summarized below.

Applicant states that it was organized as a corporation under the laws of Maryland on July 22, 1982, and that it registered under the Act on July 22, 1982. Although it will have initially only one investment portfolio the Board of

ATTACHMENT II

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMERICAN SOCIETY OF SANITARY ENGINEERING; a corporation.	File No. 822 3197 AGREEMENT CONTAINING CONSENT ORDER TO CEASE AND DESIST

The Federal Trade Commission having initiated an investigation of certain acts and practices of American Society of Sanitary Engineering, Inc., and it now appearing that American Society of Sanitary Engineering, Inc., hereinafter sometimes referred to as proposed respondent, is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

IT IS HEREBY AGREED by and between American Society of Sanitary Engineering, Inc., by its duly authorized officer, and its attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent is organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at P.O. Box 9712, in the Town of Bay Village, in the State of Ohio.

2. Solely for purposes of this agreement and order and any subsequent action pursuant to the Federal Trade Commission Act for a violation of this order, proposed respondent admits all the jurisdictional facts set forth in the draft complaint here attached.

3. Proposed respondent waives:

(a) any further procedural steps;

(b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of §2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to-order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

For purposes of this order, the following definitions shall apply:

"ASSE" means the American Society of Sanitary Engineering, its successors and assigns.

"Competent and reliable testing criteria" means a method or methods of testing or evaluation to measure whether the performance of a given product satisfies the implicit or explicit performance goals that underlie a standard. A rebuttable presumption of competence and reliability shall exist for testing criteria that are developed by a testing laboratory or expert that has been relied upon by ASSE to judge the acceptability of other products covered by standards.

"Competing products" means products sold or available in the market that can be used for substantially the same end use as the applicant's product.

"Reasonable standard setting criteria" means criteria which are consistently applied in the development or modification of a standard and which promote the legitimate self-regulatory goals of ASSE, such as assuring a reasonable and adequate level of safe and effective performance for a product. It shall not be reasonable for ASSE to require that the performance level for an applicant's product exceed the performance level required of competing products.

I

IT IS ORDERED that respondent American Society of Sanitary Engineering, its successors and assigns, and respondent's officers, agents, representatives, employees, and committees, directly or through any corporate or other device, in connection with any standard or seal of approval in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (hereinafter standard or seal of approval), do forthwith cease and desist, from directly or indirectly:

A. failing to issue a new standard or a modification of an existing standard, after receipt of a written application requesting such actions, for the reason that the product to be covered by the requested standard or modification is: (1)

patented or (2) produced by only one manufacturer or a limited number of manufacturers;

B. failing to issue for any product a new standard, a modification of an existing standard, or a seal of approval whenever (1) ASSE has received a written application requesting such action, (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing product(s) (e.g., the applicant has proposed competent and reliable testing criteria for the product and, under the proposed criteria, has demonstrated that the product meets the existing standard's performance goals), and (4) ASSE does not at that time possess and rely upon a justification for failing to issue the requested standard, modification, or seal of approval that would satisfy reasonable standard setting criteria.

II

IT IS FURTHER ORDERED that whenever (1) ASSE receives for any product a written application requesting that ASSE issue a new standard, a modification of an existing standard, or a seal of approval (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing products, and (4) ASSE fails to issue the requested standard, modification, or seal of approval, ASSE shall:

A. provide to the applicant a written statement of the justification and bases for the failure, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied;

B. provide to the applicant a reasonable opportunity to respond;

C. if the applicant responds in writing, provide the applicant a written statement of the justifications and bases for the final decision which addresses all the issues raised by the applicant's response, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied; and

D. maintain copies of the applicant's submissions, of all responses made to the applicant, of the applicant's responses thereto, if any, and of the justifications and bases for the final decisions.

III

IT IS FURTHER ORDERED that ASSE shall incorporate the requirements of Parts I and II of this order in its Bylaws and publish the requirements of Parts I and II of this order in the ASSE Standards Handbook and the ASSE Yearbook.

IV

IT IS FURTHER ORDERED that ASSE shall:

A. maintain in a separate file for a period of at least ten (10) years after the date of service of this order and, upon request, make available to the Federal Trade Commission for inspection and copying every application for issuance or modification of an ASSE standard or issuance of a seal of approval and all documents that discuss, refer, or relate thereto;

B. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance obligations arising out of this order, including but not limited to dissolution, assignment, a sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries; and

C. within sixty (60) days from the date of service of this order submit a report, in writing, to the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order.

Signed this 15th day of May, 1984.

AMERICAN SOCIETY OF SANITARY ENGINEERING
a corporation

BY: [signature]
(Name)
President
(Title)
P.O. Box 40362
(Street)
Bay Village Ohio 44140
(City and State)
Sanford Schwartz
Counsel for American
Society of Sanitary Engineering

FEDERAL TRADE COMMISSION

BY: [signature]
Counsel for the
Federal Trade Commission

APPROVED:

[signature]
Michael C. McCarey
Associate Director
Bureau of Consumer Protection

[signature]
Amanda B. Pedersen
Deputy Director
Bureau of Consumer Protection

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of AMERICAN SOCIETY OF SANITARY ENGINEERING; a corporation.	DOCKET NO.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that respondent American Society of Sanitary Engineering, a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act and that this proceeding is in the public interest, hereby issues this complaint.

PARAGRAPH 1. Respondent American Society of Sanitary Engineering ("ASSE") is a non-profit District of Columbia corporation, with its principal place of business in Bay Village, Ohio. ASSE's membership consists of plumbers, plumbing equipment manufacturers, plumbing designers, plumbing contractors, plumbing inspectors, sanitary inspectors, health officers, architects, and engineers.

PARAGRAPH 2. ASSE, together with its members, is engaged in the business of developing, promulgating, promoting, and selling of plumbing product standards and seals of approval.

PARAGRAPH 3. Many members of ASSE are engaged in providing plumbing equipment and services for profit. A substantial portion of ASSE's activities relate to standards development and product approval that is of commercial benefit to many of its members. ASSE is now, and at all times relevant herein has been, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

PARAGRAPH 4. ASSE, its members and its officers:

(a) develop standards that are distributed and adopted throughout the United States;

(b) send by mail plumbing standards and other publications dealing with plumbing to plumbing professionals located throughout the United States;

(c) collect dues from members located throughout the United States.

ASSE's business is now, and at all times relevant herein has been, in or affecting comerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. §44.

PARAGRAPH 5. Members of ASSE are now and have been in competition among themselves and with others who design, install or manufacture plumbing equipment.

PARAGRAPH 6. ASSE standards for plumbing products prescribe implicit and explicit performance and design requirements for various types of plumbing products, and set forth the test methods to be used to measure performance against those requirements.

PARAGRAPH 7. Manufacturers of plumbing products participate in the development of ASSE standards by:

(a) providing technical expertise upon which standards are based;

(b) participating in drafting proposed standards;

(c) underwriting the costs of standards development;

(d) participating in various ASSE committees which review proposed standards and applications for standards; and

(e) chairing ASSE committees, serving on the ASSE Board of Directors, and holding other key administrative and policy positions within ASSE.

PARAGRAPH 8. ASSE promotes reliance on its standards and seal of approval program by building code and regulatory officials as a substitute for the evaluation of plumbing products by those officials and as a basis for approval of these products for sale in their jurisdictions. ASSE represents that its standards and seal of approval program provides an objective, independent, expert analysis of the acceptability of plumbing products covered by ASSE standards. In addition, ASSE represents that it is the leader among standards developers in developing new standards to incorporate the state of the art in technology and innovative designs.

PARAGRAPH 9. As a result, and because most state and local building code and regulatory officials do not have the technical or financial resources to evaluate the performance characteristics of plumbing products, there is extensive reliance upon ASSE standards and seals of approval. Thirty states and numerous local jurisdictions have adopted ASSE standards into

their building codes. In those jurisdictions, evidence of compliance with ASSE standards is the sole means of obtaining approval for sale. In addition, ASSE standards and seals of approval are relied upon by model code groups (i.e., organizations which develop model building codes for adoption by state and local authorities), federal agencies, and foreign governments as a means of determining the acceptability of plumbing products.

PARAGRAPH 10. Because of extensive reliance upon the ASSE standards program, evidence of compliance with an ASSE standard is essential for manufacturers of plumbing products to do business in many markets. Evidence of compliance with ASSE standards confers important competitive benefits upon manufacturers by easing entry into markets, even where compliance to an ASSE standard is not required by law.

PARAGRAPH 11. ASSE promulgates a group of standards for backflow prevention products. Backflow is the unintended reversal of the flow of possibly contaminated water back into the potable water distribution system. ASSE represents that it has the most complete group of backflow prevention standards in the world.

PARAGRAPH 12. In 1964, ASSE, with the support of eighteen manufacturers of plumbing devices, developed a standard, ASSE 1002, for ballcock valves which control the supply of water into toilet flush tanks. Valves performing this function are referred to as toilet tank fill valves. A ballcock valve is opened or closed by means of a float or similar device. ASSE 1002 specifies that ballcock valves must be equipped with a vacuum breaker or air gap to prevent backflow. ASSE 1002 is the only standard developed by ASSE for toilet tank fill valves.

PARAGRAPH 13. As a result of ASSE's representations as to its expertise in plumbing generally, and in all types of backflow prevention devices in particular, and its representations as to its leadership in incorporating innovative technology into its standards program, many building code and regulatory officials and others are led to believe that ASSE-approved ballcock valves are the only appropriate, acceptable, and adequate means of preventing backflow from toilet tanks into potable water supply systems. Many building code and regulatory officials and others rely on ASSE 1002 as the only standard for evaluating the acceptability of toilet tank fill valves.

PARAGRAPH 14. J.H. Industries, Inc., (J.H.) a California corporation with its principal place of business at 980 Rancheros Drive, San Marcos, California, manufactures an innovative toilet tank fill valve, under the brand name Fillpro. The Fillpro valve differs from ballcock valves in that it uses a pressure sensitive diaphragm to control the water level and a double check valve to prevent backflow rather than an air gap or vacuum breaker. J.H., in marketing the Fillpro valve, represents that its design offers

performance advantages over ballcock valves. These include: that use of the Fillpro valve by toilet manufacturers would permit greater flexibility in design of toilets resulting in lower material costs; that the Fillpro valve is safer than ballcock valves because it is less likely than ballcock valves to be incorrectly installed so as to allow backflow; that the Fillpro valve has fewer moving parts than ballcock valves and therefore needs replacement less frequently; that the Fillpro valve operates more quietly than ballcock valves; and that the Fillpro valves can be adjusted to regulate the water level in the flush tank to conserve water.

PARAGRAPH 15. Because ASSE 1002 specifies ballcocks equipped with vacuum breakers or air gaps as the only acceptable design for a toilet tank fill valve, the Fillpro valve is, by ASSE's definition, nonstandard. Without an ASSE standard for evaluating the Fillpro valve, J.H. has no means to establish to building code and regulatory officials and others who rely on ASSE standards that the Fillpro valve adequately prevents backflow.

PARAGRAPH 16. J.H. has developed credible evidence to demonstrate that the Fillpro valve protects against backflow at least as well as ballcock valves. On the basis of this evidence, several model code groups, local jurisdictions, and foreign countries have approved the Fillpro valve for sale. This evidence includes:

(a) testing by Truesdail Laboratories, Inc., an independent laboratory, against a version of ASSE 1002 modified by J.H. to reflect the design differences between the Fillpro valve and ballcock valves that resulted in a finding that the Fillpro valve adequately prevented backflow;

(b) testing by the National Sanitation Foundation, which is accredited by ASSE for testing products according to ASSE standards, against a new standard, developed by J.H. with the assistance of an independent expert, based on performance requirements of two ASSE standards that determined that the Fillpro valve provided adequate protection against backflow; and

(c) the expert opinion of ASSE's Standards Coordinator who assisted in drafting the standard described in (b), above, and who stated that, after reviewing the test results based upon that standard "the Fillpro valve has demonstrated its Backflow preventing capabilities."

PARAGRAPH 17. ASSE has refused to modify or develop a standard for evaluating the Fillpro valve. As a result, J.H. has been hindered or prevented from marketing the Fillpro valve in jurisdictions which rely on ASSE standards. These restrictions limit J.H.'s sales in the market for replacement valves installed

by plumbers and consumers and in the market for valves installed as original equipment by manufacturers of toilets.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of paragraphs 1 through 17 are incorporated by reference herein as if fully set forth verbatim.

PARAGRAPH 18. In 1975, J.H. requested that ASSE modify ASSE 1002 to permit the use of a double check valve as a means of preventing backflow in toilet tank fill valves. J.H. supported its request with the evidence described in paragraph 16(a), above. ASSE rejected the revision proposed by J.H. on the ground that J.H.'s proposal "was contrary to established practices for the prevention of backflow" and that ASSE-approved ballcocks were the only acceptable means for preventing backflow. ASSE did not address or identify any inadequacies in the evidence offered in support of the proposed revision, nor did ASSE provide any evidentiary support for exclusive reliance on the existing design (i.e., ballcocks with air gaps or vacuum breakers) to prevent backflow.

PARAGRAPH 19. In adopting the policies and engaging in the acts and practices described in Paragraph 18, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PARAGRAPH 20. ASSE had no reasonable basis or justification for rejecting the innovative design and relying on ballcocks with vacuum breakers or air gaps as the only acceptable design for toilet tank fill valves. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of paragraphs 1 through 17 are incorporated herein as if set forth verbatim.

PARAGRAPH 21. In 1978, J.H. developed a standard for evaluating its product by drawing from applicable portions of existing ASSE standards. J.H. has requested that ASSE adopt this standard on several occasions and supported that request with the evidence described in paragraph 16. ASSE has refused to adopt the proposed standard or even to consider the standard and supporting evidence. ASSE justified its refusal on the ground that ASSE has a policy of refusing to develop a standard for a product which is patented or manufactured by only one manufacturer.

PARAGRAPH 22. In adopting the policies and engaging in the acts and practices described in paragraph 21, ASSE has acted as a combination of or in a combination with one or more of its

manufacturer members.

PARAGRAPH 23. ASSE has no reasonable basis or justification for its refusal to develop standards for products manufactured by only one manufacturer. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

PARAGRAPH 24. The purposes or effects of the acts and practices described in paragraphs 17 through 23 are and have been to unreasonably restrain trade and hinder competition in the manufacture and sale of plumbing devices in numerous geographic markets, and to unreasonably deprive consumers of the benefits of competition in the following ways, among others:

(a) an innovative product has been excluded from various geographic markets of the United States;

(b) building code and regulatory officials and buyers of toilet tank fill valves have been misled to believe that the product will not perform adequately to prevent backflow when compared to ballcock valves; and

(c) building and regulatory code officials and buyers of toilet tank fill valves have been deprived of information about the performance of the product.

PARAGRAPH 25. The policies, acts, and practices described in paragraphs 17 through 23 are in or affect commerce as commerce is defined in the Federal Trade Commission Act.

PARAGRAPH 26. The policies, acts and practices and combination described above were and are to the prejudice or injury of the public, and constituted and now constitute unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this _____ day of _____, 1984, issues its complaint against the American Society of Sanitary Engineering.

By the Commission.

SEAL

Emily H. Rock
Secretary

American Society of Sanitary Engineering
File No. 822 3197

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a consent order from the American Society of Sanitary Engineering (ASSE).

The proposed order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and comments received. At that time, the Commission will decide whether it should withdraw from the agreement or make the agreement's order final.

The Complaint

The complaint, prepared for issuance by the Commission, alleges that ASSE has unreasonably denied standards coverage to the Fillpro valve, an innovative plumbing product manufactured by J.H. Industries (J.H.). According to the complaint, ASSE has offered two justifications for its denial. The first is ASSE's unjustified assertion that only the design requirements contained in the existing ASSE standard (ASSE 1002) are acceptable. The second is ASSE's policy of refusing to provide standards coverage for products that are patented or produced by a single manufacturer. The complaint asserts that ASSE had no reasonable basis or justification for its policies or conduct. The complaint also asserts that ASSE's actions have had the effect of unreasonably restraining trade and hindering competition in the manufacture and sale of plumbing devices in markets where there is reliance upon ASSE standards. The complaint alleges that ASSE's refusal constitutes a concerted refusal to deal with the manufacturer and violates Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.

The complaint alleges that ASSE is an organization composed of various segments of the plumbing industry including manufacturers of plumbing products. According to the complaint, ASSE's principal activity is the development of standards for plumbing products and the issuance of seals of approval to products that comply with its standards. The complaint alleges that there is extensive reliance upon ASSE standards by state and local building code officials, model code groups (organizations that develop model building codes for adoption by state and local authorities), federal agencies, foreign governments, and others as a basis for determining product acceptability. The complaint further alleges that because of this reliance, compliance with ASSE standards confers important competitive benefits upon manufacturers of plumbing products and is essential to doing business in many markets.

The complaint alleges that J.H. manufactures the Fillpro valve, an innovative toilet tank fill valve that it has patented. According to the complaint, the Fillpro valve operates on different principles than ASSE-approved valves and does not meet design specifications set forth in the ASSE 1002. The complaint alleges that J.H. requested that ASSE modify the existing standard or develop a new standard to cover the Fillpro valve. The complaint asserts that J.H. supported these requests with extensive and credible evidence that the Fillpro valve performs as well as ASSE-approved valves.

The complaint alleges that ASSE refused J.H.'s requests. According to the complaint, ASSE never evaluated J.H.'s evidence concerning the Fillpro valve's performance. Instead, ASSE allegedly based its decision solely upon its policy of refusing to extend standards coverage to products that are patented or produced by a single manufacturer and upon an unsupported assertion that the design specified in the standard was the only acceptable design. The complaint asserts that ASSE had no reasonable basis for its conduct and policies. As a result of ASSE's refusal, J.H. has allegedly been hindered or prevented from selling the Fillpro valve in jurisdictions that rely on the ASSE standard.

The Proposed Consent Order

The proposed order is intended to remedy the effects of ASSE's unreasonable refusal to extend standards coverage to the Fillpro valve and to prevent future violations of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Provision IA of the order prohibits ASSE from refusing to issue a new standard or modify an existing standard because the product to be covered by the new standard is either patented or produced by one or a limited number of manufacturers.

Provision IB of the order requires ASSE to have a justification that would satisfy reasonable standard setting criteria when it refuses to adopt or modify a standard. Reasonable standard setting criteria are defined in the order as criteria that relate to ASSE's legitimate self-regulatory goals, such as assuring that products provide an adequate level of safe performance. Under the order, the criteria must be consistently applied. The order specifically disallows setting performance levels for an applicant's product that are higher than those set for a competitor's product.

Provision IB is not triggered unless the applicant has met three conditions. First, ASSE must receive a written application requesting that it extend standards coverage to a product. Second, ASSE must have issued standards on competing products. Third, the applicant must have reasonably established in its application that its product meets the implicit or explicit performance goals contained in the existing standard. Provision IB provides an illustration drawn from the facts alleged in the

complaint to demonstrate how an applicant can satisfy the third condition. Specifically, an applicant will have satisfied this condition when it has proposed competent and reliable testing criteria for the product, and under the criteria, has demonstrated that the product meets the standard's implicit or explicit performance goals. The term competent and reliable testing criteria is defined in the order as a method or methods of testing or evaluation to measure whether the performance of a given product meets the standard's performance goals.

Provision II requires that, if ASSE denies a request from an applicant who has met the conditions set forth in Provision IB, it will provide the applicant with written statement of the reasons and evidence for its decision. Further, ASSE must provide the applicant with an opportunity to respond, and if a written response is offered, ASSE must provide written statement of its final decision and of the basis for that decision. ASSE must maintain writen records regarding the statements provided to the applicant, the applicant's response, if any, and the justification and bases for the final decision.

Provision III requires ASSE to incorporate the requirements of Parts I and II of the order into its bylaws and to publish the requirements of Parts I and II in the ASSE Standards Handbook and the ASSE Yearbook. Provision IV requires ASSE to keep written records concerning any requests for standards coverage, to notify the Federal Trade Commission of changes in its organization that might affect its ability to comply with the order, and to provide a report describing compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed agreement and order or to modify in any way their terms.

that were made when the order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) *Findings.* A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Middle Atlantic marketing area. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area; and the minimum prices specified in the order as hereby amended are such prices as will reflect the aforesaid factors, ensure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order Relative to Handling

It is therefore ordered that on and after the date effective hereof, the handling of milk in the Middle Atlantic marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the recommended decision issued by the Deputy Administrator, Marketing Programs, on July 12, 1984 and published in the Federal Register on July 18, 1984 (49 FR 29100), shall be and are the terms and provisions of this order, amending the order, and are set forth in full herein, subject to a modification in § 1004.30.

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. In § 1004.7, add new paragraphs (a)(3) and (4) to read as follows:

§ 1004.7 Pool plant.

* * * * *

(a) * * *

(3) A plant which meets the "pool plant" requirements of this paragraph during any month shall retain its pool status during the immediately succeeding two months as long as the plant continues to meet the 15-percent in-area Class I disposition requirement, unless written application is filed by the plant operator with the market administrator on or before the first day of any such month requesting that the plant be designated a nonpool plant for such month and each subsequent month during which it does not otherwise qualify pursuant to this paragraph.

(4) A plant's status as an other order plant pursuant to paragraph (f) of this section shall not be affected by the provisions of paragraph (a)(3) of this section.

2. In § 1004.9, revise paragraph (b) to read as follows:

§ 1004.9 Handler.

* * * * *

(b) Any cooperative association or federation of cooperative associations with respect to the milk of any producer which it causes to be diverted in accordance with the provisions of § 1004.12 for the account of such cooperative association or federation.

* * * * *

3. In § 1004.12, revise paragraph (d)(2)(i) to read as follows:

§ 1004.12 Producer.

* * * * *

(d) * * *

(2) * * *

(i) All of the diversions of milk of members of a cooperative association or a federation of cooperative associations to nonpool plants are for the account of such cooperative association or federation, and the amount of member milk so diverted does not exceed 50 percent of the volume of milk of all members of such cooperative association or federation delivered to or diverted from pool plants during the month.

* * * * *

§ 1004.30 [Amended]

4. In § 1004.30, revise paragraph (d) to read as follows:

* * * * *

(d) On or before the eighth day after the end of each month, each cooperative association and/or a federation of cooperative associations shall report with respect to milk for which it is a handler pursuant to § 1004.9 (b) or (c) as follows:

* * * * *

[FR Doc. 84-21364 Filed 8-10-84; 8:45 am]
BILLING CODE 3410-02-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[File No. 822 3187]

American Society of Sanitary Engineering; Proposed Consent Agreement With Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would require, among other things, that a Bay Village, Ohio organization ("ASSE"), whose members consist of manufacturers of plumbing products and others associated with the plumbing industry, to cease refusing written requests for issuance of a standard or modification of an existing standard for a product because the product is patented or produced by only one or a limited number of manufacturers. The order would also bar the society from failing to take sought action when it has already issued a standard, modification of a standard or a seal of approval covering a competing product and the applicant has demonstrated that its product adequately meets required performance goals. Should ASSE fail to issue the requested standard, modification or seal of approval, it would be required to provide applicant with a statement of the justification and bases for the failure together with a reasonable opportunity to respond, and to maintain copies of relevant submissions and responses. Additionally, the society would be required to incorporate the requirements of Parts I and II of the Order into its Bylaws, and publish them in both its Yearbook and Standards Handbook.

DATE: Comments must be received on or before October 12, 1984.

ADDRESS: Comments should be directed to: FTC/Office of the Secretary, Room 136, 6th St. and Pa. Ave., NW., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: FTC/H 272, Michael C. McCarey, Washington, D.C. 20580 (202) 523–1415.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist and an explanation thereof, having been filed and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

List of Subjects in 16 CFR Part 13

Standards, Plumbing products, Trade practices.

In the matter of American Society of Sanitary Engineering; a corporation: File No. 822 3197.

Agreement Containing Consent Order To Cease and Desist

The Federal Trade Commission having initiated an investigation of certain acts and practices of American Society of Sanitary Engineering, Inc., and it now appearing that American Society of Sanitary Engineering, Inc., hereinafter sometimes referred to as proposed respondent, is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated.

It is hereby agreed by and between American Society of Sanitary Engineering, Inc., by its duly authorized officer, and its attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent is organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at P.O. Box 9712, in the town of Bay Village, in the State of Ohio.

2. Solely for purposes of this agreement and order and any subsequent action pursuant to the Federal Trade Commission Act for a violation of this order, proposed respondent admits all the jurisdictional facts set forth in the draft complaint here attached.

3. Proposed respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft complaint here attached.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to-order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondent has read the proposed complaint and order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order

For purposes of this order, the following definitions shall apply:

"ASSE" means the American Society of Sanitary Engineering, its successors and assigns.

"Competent and reliable testing criteria" means a method or methods of testing or evaluation to measure whether the performance of a given product satisfies the implicit or explicit performance goals that underlie a standard. A rebuttable presumption of competence and reliability shall exist for testing criteria that are developed by a testing laboratory or expert that has been relied upon by ASSE to judge the acceptability of other products covered by standards.

"Competing products" means products sold or available in the market that can be used for substantially the same end use as the applicant's product.

"Reasonable standard setting criteria" means criteria which are consistently applied in the development or modification of a standard and which promote the legitimate self-regulatory goals of ASSE, such as assuring a reasonable and adequate level of safe and effective performance for a product. It shall not be reasonable for ASSE to require that the performance level for an applicant's product exceed the performance level required of competing products.

I

It is ordered that respondent American Society of Sanitary Engineering, its successors and assigns, and respondent's officers, agents, representatives, employees, and committees, directly or through any corporate or other device, in connection with any standard or seal of approval in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (hereinafter standard or seal of approval), do forthwith cease and desist, from directly or indirectly:

A. failing to issue a new standard or a modification of an existing standard, after receipt of a written application requesting such actions, for the reason that the product to be covered by the requested standard or modification is: (1) Patented or (2) produced by only one

manufacturer or a limited number of manufacturers;

B. failing to issue for any product a new standard, a modification of an existing standard, or a seal of approval whenever (1) ASSE has received a written application requesting such action, (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing product(s) (*e.g.*, the applicant has proposed competent and reliable testing criteria for the product and, under the proposed criteria, has demonstrated that the product meets the existing standard's performance goals), and (4) ASSE does not at that time possess and rely upon a justification for failing to issue the requested standard, modification, or seal of approval that would satisfy reasonable standard setting criteria.

II

It is further ordered that whenever (1) ASSE receives for any product a written application requesting that ASSE issue a new standard, a modification of an existing standard, or a seal of approval (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing products, and (4) ASSE fails to issue the requested standard, modification, or seal of approval, ASSE shall:

A. provide to the applicant a written statement of the justification and bases for the failure, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied;

B. provide to the applicant a reasonable opportunity to respond;

C. if the applicant responds in writing, provide the applicant a written statement of the justifications and bases for the final decision which addresses all the issues raised by the applicant's response, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied; and

D. maintain copies of the applicant's submissions, of all responses made to the applicant, of the applicant's responses thereto, if any, and of the justifications and bases for the final decisions.

III

It is further ordered that ASSE shall incorporate the requirements of Parts I and II of this order in its Bylaws and publish the requirements of Parts I and II of this order in the ASSE Standards Handbook and the ASSE Yearbook.

It is further ordered that ASSE shall:

A. Maintain in a separate file for a period of at least ten (10) years after the date of service of this order and, upon request, make available to the Federal Trade Commission for inspection and copying every application for issuance or modification of an ASSE standard or issuance of a seal of approval and all documents that discuss, refer, or relate thereto;

B. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance obligations arising out of this order, including but not limited to dissolution, assignment, a sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries; and

C. Within sixty (60) days from the date of service of this order submit a report, in writing, to the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order.

American Society of Sanitary Engineering

[File No. 822 3197]

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a consent order from the American Society of Sanitary Engineering (ASSE).

The proposed order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and comments received. At that time, the Commission will decide whether it should withdraw from the agreement or make the agreement's order final.

The Complaint

The complaint, prepared for issuance by the Commission, alleges that ASSE has unreasonably denied standards coverage to the Fillpro valve, an innovative plumbing product manufactured by J.H. Industries (J.H.). According to the complaint, ASSE has offered two justifications for its denial. The first is ASSE's unjustified assertion that only the design requirements contained in the existing ASSE standard (ASSE 1002) are acceptable. The second is ASSE's policy of refusing to provide standards coverage for products that are patented or produced by a single manufacturer. The complaint asserts that ASSE had no reasonable basis or justification for its policies or conduct. The complaint also asserts that ASSE's actions have had the effect of unreasonably restraining trade and hindering competition in the manufacture and sale of plumbing devices in markets where there is reliance upon ASSE standards. The complaint alleges that ASSE's refusal constitutes a concerted refusal to deal with the manufacturer and violates section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act.

The complaint alleges that ASSE is an organization composed of various segments of the plumbing industry including manufacturers of plumbing products. According to the complaint, ASSE's principal activity is the development of standards for plumbing products and the issuance of seals of approval to products that comply with its standards. The complaint alleges that there is extensive reliance upon ASSE standards by state and local building code officials, model code groups (organizations that develop model building codes for adoption by state and local authorities), federal agencies, foreign governments, and others as a basis for determining product acceptability. The complaint further alleges that because of this reliance, compliance with ASSE standards confers important competitive benefits upon manufacturers of plumbing products and is essential to doing business in many markets.

The complaint alleges that J.H. manufactures the Fillpro valve, an innovative toilet tank fill valve that it has patented. According to the complaint, the Fillpro valve operates on different principles than ASSE-approved valves and does not meet design specifications set forth in the ASSE 1002. The complaint alleges that J.H. requested that ASSE modify the existing standard or develop a new standard to cover the Fillpro valve. The complaint asserts that J.H. supported these requests with extensive and credible evidence that the Fillpro valve performs as well as ASSE-approved valves.

The complaint alleges that ASSE refused J.H.'s requests. According to the complaint, ASSE never evaluated J.H.'s

evidence concerning the Fillpro valve's performance. Instead, ASSE allegedly based its decision solely upon its policy of refusing to extend standards coverage to products that are patented or produced by a single manufacturer and upon an unsupported assertion that the design specified in the standard was the only acceptable design. The complaint asserts that ASSE had no reasonable basis for its conduct and policies. As a result of ASSE's refusal, J.H. has allegedly been hindered or prevented from selling the Fillpro valve in jurisdictions that rely on the ASSE standard.

The Proposed Consent Order

The proposed order is intended to remedy the effects of ASSE's unreasonable refusal to extend standards coverage to the Fillpro valve and to prevent future violations of section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act. Provision IA of the order prohibits ASSE from refusing to issue a new standard or modify an existing standard because the product to be covered by the new standard is either patented or produced by one of a limited number of manufacturers.

Provision IB of the order requires ASSE to have a justification that would satisfy reasonable standard setting criteria when it refuses to adopt or modify a standard. Reasonable standard setting criteria are defined in the order as criteria that relate to ASSE's legitimate self-regulatory goals, such as assuring that products provide an adequate level of safe performance. Under the order, the criteria must be consistently applied. The order specifically disallows setting performance levels for an applicant's product that are higher than those set for a competitor's product.

Provision IB is not triggered unless the applicant has met three conditions. First, ASSE must receive a written application requesting that it extend standards coverage to a product. Second, ASSE must have issued standards on competing products. Third, the applicant must have reasonably established in its application that its product meets the implicit or explicit performance goals contained in the existing standard. Provision IB provides an illustration drawn from the facts alleged in the complaint to demonstrate how an applicant can satisfy the third condition. Specifically, an applicant will have satisfied this condition when it has proposed competent and reliable testing criteria for the product, and under the criteria, has demonstrated that the product meets the standard's implicit or explicit performance goals. The term competent and reliable testing criteria is defined in the order as a method or methods of testing or evaluation to measure whether the performance of a given product meets the standard's performance goals.

Provision II requires that, if ASSE denies a request from an applicant who has met the conditions set forth in Provision IB, it will provide the applicant with written statement of the reasons and evidence for its decision. Further, ASSE must provide the applicant with an opportunity to respond, and if a written response is offered, ASSE must provide written statement of its final decision and of the basis for that decision. ASSE must maintain written records regarding the statements provided to the applicant, the applicant's response, if any, and the justification and basis for the final decision.

Provision III requires ASSE to incorporate the requirements of Parts I and II of the order into its bylaws and to publish the requirements of Parts I and II in the ASSE Standards Handbook and the ASSE Yearbook. Provision IV requires ASSE to keep written records concerning any requests for standards coverage, to notify the Federal Trade Commission of changes in its organization that might affect its ability to comply with the order, and to provide a report describing compliance with the order.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed agreement and order or to modify in any way their terms.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 84-21308 Filed 8-10-84; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. 83N-0250]

Food Labeling; Nutrition Labeling of Food; Calorie Content

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the food labeling regulations to provide for the exclusion of nondigestible dietary fiber when determining the calorie content of a food for nutrition labeling purposes. This proposal would allow for a more accurate declaration of the available calories in high-fiber foods.

DATE: Comments by October 12, 1984.

ADDRESSES: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857. Request for single copies of the analytical method may be sent to the Dockets Management Branch or to the Division of Nutrition, Center for Food Safety and Applied Nutrition (HFF-280), Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

FOR FURTHER INFORMATION CONTACT: Elizabeth J. Campbell, Center for Food Safety and Applied Nutrition (HFF-312), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-485-0177.

SUPPLEMENTARY INFORMATION: In the Federal Register of September 22, 1978 (43 FR 43240), FDA published a regulation (21 CFR 105.66) that established the criteria to be met when making a reduced calorie claim on the label of a product. The general criteria required, among other things, that a product labeled as "reduced calorie" have a caloric reduction of at least one-third of the calorie content of an equivalent serving of the same food without fabrication or alteration (§ 105.66(d)(1)(i)). In the same issue of the Federal Register (43 FR 43281), FDA issued a proposal, based on a petition, to allow a bread product to bear "reduced calorie" labeling if it achieved a one-quarter caloric reduction, rather than the one-third reduction specified in the general requirements.

After review of the comments submitted, FDA withdrew the proposal (June 20, 1980; 45 FR 41652) on the grounds that a calorie reduction of one-third is technologically feasible and a product with such a calorie reduction is acceptable to those consumers interested in or participating in weight-control programs. In response to an objection and request for hearing filed by Interstate Brands Corp., a manufacturer of a 25-percent reduced-calorie bread, FDA revoked the withdrawal of the proposal and reopened the comment period by notice in the Federal Register of June 26, 1981 (46 FR 33053). (FDA treated the objection and request for hearing as a request for reconsideration under 21 CFR 10.33 and granted the request by revoking the withdrawal of the proposal.) The basis for the manufacturer's request was, among

ATTACHMENT III

FEDERAL TRADE COMMI
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

August 21, 1984

Ms. Sadye E. Dunn
Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Ms. Dunn:

The Federal Trade Commission would like to comment on a proposed amendment to Consumer Product Safety Commission (CPSC) regulations announced in your June 19, 1984, Federal Register Notice. Under the proposed amendment, CPSC would select and endorse a limited number of industry standards.[1] We believe that CPSC endorsement of voluntary standards under the proposed amendment has the potential to reduce competition and discourage innovation. Therefore, we urge that the proposed amendment be revised along the lines suggested below.

The Commission has been examining the antitrust and consumer protection implications of industry standards and certifications since 1974. One aspect of this program has been to comment on the actions of federal agencies that rely on industry standards when the actions of the agency raise competition or consumer protection concerns.

Two aspects of the proposed amendment concern us. First, the amendment does not require CPSC to consider the competitive impact of its actions when deciding whether to endorse a standard. We note that the Consumer Product Safety Act requires that CPSC consider, when promulgating a consumer product safety rule, "any means of achievement of the objective ... while minimizing adverse effects upon competition."[2] CPSC should also evaluate the competitive effects of endorsement of any industry standard. CPSC endorsement appears likely to confer significant competitive benefits upon products that comply with endorsed standards. Unless CPSC evaluates the potential competitive impact of endorsement on affected markets, and takes steps to

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[1] The proposed amendment specifies three levels of CPSC support for industry standards: adoption, endorsement, and recognition. For purposes of convenience, we shall refer to all three as endorsement.

[2] 15 U.S.C. § 2508 (f)(1)(D) (1976).

minimize any adverse effect on competition, CPSC endorsement might injure consumers.[3]

For example, CPSC's endorsement might mislead consumers about the relative safety and performance of competing products. Competing products may be covered by different standards. For instance, different standards cover gas-fired heaters, kerosene heaters, electric heaters, and wood-burning heaters that compete in the same market. CPSC endorsement of one of these standards may lead consumers to believe that products that comply with the endorsed standard are superior to products that comply with other standards. In such situations, manufacturers of products that comply with other standards would be at a competitive disadvantage, even if their products were equal or superior in safety or performance to products complying with CPSC-endorsed standards.

The second aspect of the proposed amendment that concerns us is that the proposal does not provide for periodic review of changes in endorsed standards. Industry standards change frequently to accommodate changes in technology. Unless CPSC systematically reviews any changes in the standards it endorses, it may discourage innovation by encouraging reliance among buyers upon standards based on outdated technology.

We urge CPSC not to adopt the proposed amendment unless it is revised to ensure that CPSC endorsement of a standard would not reduce competition or delay innovation. Commission staff would be happpy to provide further information and comment concerning these issues as the rulemaking progresses. If they can be of any assistance, please contact Eugene R. Curry, Division of Service Industry Practices, at (202) 523-4555.

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[3] An evaluation of the impact of CPSC endorsement on affected markets would be consistent with OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Standards." The OMB Circular states that when Federal agencies rely on industry standards, "[f]ull account shall be taken of the impact on the economy, applicable Federal laws, policies, and national objectives, including for example, laws and regulations relating to antitrust ...." 47 Fed. Reg. 49496, 49497 (Nov. 1, 1982).

Thank you for the opportunity to comment on the issues raised by the proposed amendment.

By direction of the Commission.

Sincerely,

Emily H. Rock

Emily H. Rock
Secretary

ATTACHMENT IV

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

MAR 15 1983

Thorne G. Auchter
Assistant Secretary of Labor
Docket Office, Docket S-105, Room S6212
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Accreditation of Testing Laboratories

Dear Mr. Auchter:

This is in response to your January 4, 1983 Advance Notice of Proposed Rulemaking (ANPR) to revise Occupational Safety and Health Administration (OSHA) regulations relating to testing laboratory accreditation. The Commission strongly encourages OSHA to develop a program to accredit testing laboratories. We think a laboratory accreditation program can be developed that would greatly benefit competition in the market for testing and certification for compliance with OSHA requirements, without having any negative effect on workplace safety.

The Commission has had an ongoing Standards and Certification program since 1974. The purpose of this program is to examine and eliminate inappropriate restraints on competition and practices that deceive or otherwise harm consumers in the standards and certification area. The program includes a rulemaking proceeding and a variety of government liaison and other activities. One of the areas of program interest has been testing laboratory accreditation.

OSHA's current lack of a laboratory accreditation program, coupled with requirements that certain products be approved by a "nationally recognized testing laboratory", appears to be limiting competition unnecessarily in product safety testing. When OSHA did not take action to accredit testing laboratories under Part 1907, the Commission began receiving complaints from testing laboratories that they were excluded from competition in the OSHA compliance testing market. These complaints, and the ANPR, indicate that Underwriters Laboratories (UL) and Factory Mutual Engineering Corp. (FM) are the only laboratories accepted by OSHA as nationally recognized. The excluded laboratories asserted that they are injured as a result, as are the product manufacturers who are forced to purchase testing services in a less than competitive market. The Commission's Assistant Director for Marketing Practices sent letters to OSHA in 1976 and 1977 citing these

complaints and requesting speedy implementation of a laboratory accreditation program. (The letters and OSHA's reponses are attached.)

The Commission has continued to receive complaints, particularly during the Standards and Certification rulemaking proceeding, about lack of competition in safety testing. The rulemaking record, available for inspection, contains a substantial amount of comment on this issue submitted in 1979-1980. For example, the American Council of Independent Laboratories submitted a 1979 survey of the structure and anticompetitive aspects of product certification in the United States (Statement of American Council of Independent Laboratories, Exhibit 2, FTC Dkt. No. 215-61, LL-454). This survey summarizes interviews with 30 certifiers plus manufacturers, insurers, and government regulatory officials. The survey describes extensive limitations on competition in testing and certification.

The Commission supports development and implementation of a program to accredit organizations for OSHA compliance testing and certification.[1] If OSHA does not take affirmative action to accredit testing laboratories, the existing barriers to competition in product testing and certification would be preserved. OSHA's current reliance on only UL and FM appears to limit competition in safety certification. We think such a limitation is likely to harm consumer welfare through higher prices, lower quality service, and delayed market entry of innovative products. In view of the potential benefits that would accrue in the marketplace from increased competition in product testing, we strongly support rapid action on the part of OSHA to create a system for recognizing organizations competent to carry out certification activities. This could be done by implementing an OSHA in-house program, such as existing Part 1907, or by relying on the results of other accreditation programs. In either case, OSHA would have the ultimate authority to determine which laboratories merit accreditation and which do not. In view of this, we do not see (and the ANPR does not raise) any reason why an accreditation program with properly designed and enforced criteria would have a negative effect on worker safety.

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[1] Such a program should, of course, require any laboratory seeking accreditation to pay the expenses incurred in determining whether that laboratory satisfies the requirements for accreditation and any expenses involved in post-accreditation monitoring to assure the laboratory's continued compliance with accreditation standards. Failure to require laboratories to pay such costs could result in too many laboratories seeking and receiving accreditation with the result that excessive resources are devoted to the accreditation process.

The following paragraphs discuss issues raised in the ANPR. The first issue is the scope of the rulemaking. Part 1907 sets forth the criteria that OSHA determined, in 1973, were necessary to ensure that safety testing and certification are done honestly and competently. It contains requirements relating not only to initial testing of products and the test methods that are to be used, but also to inspection of production facilities and followup testing and inspection. We agree that it is appropriate at this time to examine the Part 1907 criteria to determine whether they are adequate to achieve their intended purpose and whether they are all necessary to that end. We also agree that developments in laboratory accreditation since 1973, both in the public and private sectors, should be considered and utilized if they meet OSHA's needs. Most importantly, we encourage OSHA to conduct its examination expeditiously to permit competition to emerge as soon as satisfactory Part 1907 criteria are developed.

The ANPR states that the rulemaking is limited to consideration of the Part 1907 laboratory accreditation criteria and the electrical equipment standards in Part 1910. As the notice recognizes, other OSHA regulations covering other types of products require that those products be approved by nationally recognized laboratories, so in those areas, too, competition is being limited. We understand the need to examine one testing area at a time and the added difficulty of addressing these other areas that may involve numerous testing disciplines. However, similar injury to consumer welfare may be occurring in these areas. Therefore, we request that OSHA take action at its earliest convenience to revise these other Parts as soon as Parts 1907 and 1910 are revised and the changes implemented.

We reiterate our strong support for OSHA rulemaking to develop a program for testing laboratory accreditation. Commission staff has been working in the product certification area and would be happy to provide additional input as the rulemaking progresses. If we can be of further assistance, please contact Robert J. Schroeder, Program Advisor, Standards and Certification, at (202) 523-4695.

Thank you for this opportunity to comment on the issues raised in the ANPR.

By direction of the Commission.

Benjamin I. Berman
Acting Secretary
Federal Trade Commission

Enclosures

AUG 31 1976

Dr. Morton Corn
Assistant Secretary of Labor
Occupational Safety and Health
Administration
Washington, D.C. 20210

Dear Dr. Corn:,

We have received correspondence from Mr. Jack Lin, Approved Engineering Test Laboratories (AETL), relating to OSHA's policy for approval of testing laboratories. Mr. Lin complains that under 20 C.F.R. Parts 1907 and 1910 only Underwriters Laboratories and Factory Mutual Engineering Corp. are recognized by OSHA as acceptable testing laboratories. This is resulting in lost business for AETL and other independent testing laboratories.

The Federal Trade Commission staff is currently engaged in an investigation of standards development and certification. This investigation has produced numerous allegations that products and certifiers have been unreasonably denied access to certain markets. To guard against this, the Commission encourages all government agencies to seriously consider the effects on competitors of actions that specify products, producers, or testing laboratories.

Thank you for your attention.

Sincerely,

Richard C. Foster
Assistant Director for
Marketing Practices

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
WASHINGTON, D.C. 20210

Office of the Assistant Secretary

FEDERAL TRADE COMMISSION
RECEIVED
JAN 24 1977
Division of Marketing Practices

19 JAN 1977

Mr. Richard C. Foster
Assistant Director of Marketing Practices
Bureau of Consumer Protection
Federal Trade Commission
Washington, D. C. 20580

Dear Mr. Foster:

This is in response to your letter of August 31, regarding correspondence you have received from Mr. Jack Lin, Approved Engineering Test Laboratories (AETL), relating to accreditation of testing laboratories by the Occupational Safety and Health Administration (OSHA).

The situation that Mr. Lin refers to, about which he has written numerous times to us and others, is one that has grown out of an historical anomaly in the OSHA regulations. Through Section 6(a) of the Occupational Safety and Health Act of 1970, OSHA promulgated certain occupational safety and health "consensus" standards, which had been written by a variety of voluntary standards-writing organizations. The National Electrical Code is one of these national consensus standards which requires that certain products be "approved." The term "approved" is defined based on the national consensus standard to mean acceptable to the Assistant Secretary of Labor for OSHA. The definition further states that, "... an installation or equipment is acceptable to the Assistant Secretary of Labor, and approved with the meaning of this Subpart S: (i) If it is accepted, or certified, or listed, or labeled, or otherwise determined to be safe by a nationally recognized testing laboratory, such as, but not limited to Underwriters' Laboratories, Inc. (U.L.) and Factory Mutual Engineering Corporation (F.M.E.C.); ...." The national consensus standards cite U.L. and F.M.E.C. as nationally recognized testing laboratories. While there is no explicit or substantive need to limit testing to these laboratories, we have found that there are a number of complex legal and policy issues surrounding any change in the existing regulation.

Clearly, OSHA has no interest in limiting competition. Indeed, we have found that competition among equipment manufacturers and others can have a positive impact on occupational safety and health. While we recognize the potential for lost business by testing laboratories other than those listed in the regulation, we also have a broader mandate to protect

safety and health in the workplace. Broader availability of testing and certification facilities would, no doubt, contribute to fulfilling this mandate, however if not done carefully and properly the effect could be deleterious. Thus, OSHA is committed to a careful and thorough study and implementation of a responsible program to insure broadened availability of product testing.

At the present time OSHA is undergoing a major reorganization and is seeking to change direction in a number of important policy areas. With the additional technical resources that we expect this reorganization to bring on board and with the resolution of a number of very fundamental policy issues here at OSHA, we hope to fully address and resolve the product testing anomaly that Mr. Lin has pointed out to you.

If we may be of any assistance in the investigation of standards development and certification to which your letter referred, please call me or my Special Assistant for Technical Liaison, Mr. Armand Thomas.

Thank you for your interest in occupational safety and health.

Sincerely,

Morton Corn

Morton Corn
Assistant Secretary of Labor

Enclosure:
Mr. Lin's letter

April 27, 1977

Ms. Zula Bingham
Assistant Secretary
Occupational Safety and
Health Administration
Department of Labor
Washington, D.C. 20210

Re: 29 C.F.R. 1907 Accreditation
of Testing Laboratories

Dear Ms. Bingham:

The Federal Trade Commission staff is currently engaged in an investigation of standards development and product certification activities. A frequent complaint we have received is that many testing laboratories are unreasonably discriminated against by government regulations which require certification of products by one of a few named testing laboratories.

Several OSHA regulations contain such requirements. For example, 29 C.F.R. 1910.308(d) requires certification by a "nationally recognized testing laboratory, such as, but not limited to, Underwriters' Laboratories, Inc. and Factory Mutual Engineering Corp. . . ." Pursuant to these regulations, OSHA inspectors generally reject any product that is not certified by one of the two laboratories.

This practice unreasonably excludes from the marketplace other competent testing laboratories, which suffer economic injury in the form of lost business. In addition the lack of free competition might result in an increase in testing prices and a decrease in the quality of services, which would injure product manufacturers and, ultimately, consumers and workers.

I communicated these concerns to Dr. Morton Corn several months ago. He simply replied that "there are a number of complex legal and policy issues surrounding any change in the existing regulation". Copies of my letter and Dr. Corn's response are enclosed.

Some action to open the market to all competent testing laboratories, such as a laboratory accreditation program, is

essential to alleviate these injuries to consumers and competition, and should be taken immediately.

Your consideration of these comments is appreciated.

Sincerely,

Richard C. Foster
Assistant Director for
Marketing Practices

Enclosures

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration
WASHINGTON, D.C. 20210

Office of the Assistant Secretary

27 JUN 1977

Mr. Richard C. Foster
Assistant Director for Marketing Practices
Bureau of Consumer Protection
Federal Trade Commission
Washington, D. C. 20580

Dear Mr. Foster:

This is in reply to your letter of April 27, concerning the Occupational Safety and Health Administration's (OSHA) regulations on accreditation of testing laboratories (29 CFR Part 1907).

Although OSHA has promulgated rules and regulations with which to evaluate and accredit testing laboratories, specific problems, such as the accreditation of foreign laboratories, the role of nonindependent laboratories, the personnel and financial resources required to implement the program, and recent changes in our administration, have contributed to this delay in implementation. The review of the record (consisting of two public hearings) on this program has been conducted by our Office of Safety Standards. Although an exact date for a final resolution is difficult to forecast, it is my intention to address this problem as my priorities permit, and I am confident that an equitable solution can be reached within the next few months.

If we can be of further assistance, please contact us.

Sincerely,

Eula Bingham

Eula Bingham
Assistant Secretary
Occupational Safety and Health

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1907

[Docket No. S-105]

Accreditation of Testing Laboratories

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) plans to revise its regulation at 29 CFR Part 1907, "Accreditation of Testing Laboratories." This regulation established the criteria and procedures that OSHA would use to accredit testing laboratories desiring to test equipment required to be "acceptable" or "approved" under OSHA standards. To date, OSHA has not implemented this regulation, originally published on September 11, 1973, and proposed for revocation on June 3, 1974.

The purpose of this notice is to solicit information regarding the appropriate content, scope, and format of a complete revision of 29 CFR Part 1907 and complementary changes to 29 CFR Part 1910. This notice is not a proposal to revise the regulation; when the proposal is developed, it will be published in the Federal Register.

DATE: The written information requested in this notice should be postmarked on or before February 15, 1983.

ADDRESS: Written comments should be submitted, in quadruplicate, to the Docket Office, Docket S-105, Room S6212, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523-7894.

FOR FURTHER INFORMATION CONTACT: Mr. William J. Higgins, Deputy Director,

Directorate of Safety Standards Programs, Room N3605, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523-8081.

SUPPLEMENTARY INFORMATION:

Background

Certain occupational safety and health standards, particularly in 29 CFR Part 1910, require acceptability or approval of equipment, materials, or installations by a "nationally recognized testing laboratory." (*E.g.*, 29 CFR 1910.155(c)(3), 29 CFR 1910.35(h), and 29 CFR 1910.399(a)). These standards do not define "nationally recognized testing laboratory," but offer as examples of such laboratories Underwriters' Laboratories, Inc., (UL) and Factory Mutual Engineering Corp. (FM).

In order that additional laboratories could be recognized by OSHA as acceptable under such standards, the agency published, on September 11, 1973, a new Part 1907 of Title 29 of the Code of Federal Regulations (38 FR 25150). Entitled "Accreditation of Testing Laboratories," Part 1907 established the criteria and procedures that OSHA would use to accredit testing laboratories desiring to test products which require approval under Parts 1910 and 1928. The regulation was adopted under Section 8(g)(2) of the Occupational Safety and Health Act of 1970. Because of the perceived need to act without delay to provide laboratories with a system for recognition, the regulation was published without notice and comment. After promulgation, however, interested persons were given an opportunity to comment on the rule through written submissions and a public hearing. Over 130 written submissions were received. In addition, approximately 200 pages of testimony, 32 exhibits, and numerous post-hearing comments were received as a result of an informal hearing.

After reviewing these submissions, OSHA concluded that several major problems needed resolution, including whether the agency should change the requirement that laboratories be independent from manufacturers and vendors and whether the agency had sufficient resources to implement the regulation. In light of these problems, OSHA decided to reconsider the entire matter of accreditation and seek the aid of an advisory committee. On June 3, 1974, in order to give such an advisory committee the widest possible scope in its deliberations, the agency proposed to revoke the regulation (39 FR 19307).

The notice of proposed revocation invited interested persons to submit written comments on the proposal by July 3, 1974. In response, 185 written submissions were received. An informal hearing was then held, which resulted in 245 pages of testimony, 30 exhibits, and post-hearing comments.

Through their comments, parties raised several major issues. Among these were: (1) whether revocation would produce anticompetitive results, such as delay in product approval or increased charges for this service; (2) whether the rule as promulgated established barriers to international trade; (3) whether the agency should revoke the rule and simply accept the results of other laboratory accreditation systems, which where then in the process of being developed; and (4) whether the rule should be retained, with amendments to specific provisions, such as the requirement that laboratories be independent from manufacturers and vendors.

The record on the proposed revocation closed July 31, 1975 (40 FR 27891). Since that time, the matter has been in abeyance. No advisory committee has been appointed, and OSHA has neither revoked, amended, nor implemented Part 1907.

OSHA is concerned that its failure to determine how best to deal with Part 1907 has created problems for testing organizations and employers. OSHA has received complaints recently that its inaction has caused testing companies other than UL and FM to lose business and has resulted in delays to companies needing to have products tested. Because its failure to implement Part 1907 may be contributing to this situation, OSHA wishes to determine what action would now be appropriate. Through the rulemaking that will follow this ANPR, the agency will decide whether to revoke Part 1907 or to amend and implement it.

The agency's present intention is to amend Part 1907 to create a recognition system that will be administratively workable and will take advantage of recent developments by others in organizing and evaluating product certification systems. The agency also intends to amend 29 CFR Part 1910 as necessary to reflect the revised Part 1907. Such amendments would supply necessary cross references to Part 1907 and eliminate references to specific testing organizations by name.

OSHA presently plans to limit changes effected by this rulemaking to Parts 1907 and 1910 and to make needed revisions to Part 1926 (and Parts 1915 and 1918) in subsequent proceedings. This sequence will enable the agency to accomplish the present rulemaking more speedily than if other Parts were included. In addition, the agency will be able to take advantage of its experience with the revised recognition system in the subsequent amendment process.

Comments and Information Requested

At this time, OSHA requests the submission of all information, comments, and regulatory proposals related to this subject. The value to the public in general, and to OSHA, of having each interested or affected entity actively participating in this developmental stage cannot be overestimated; such input is greatly encouraged at this time by OSHA.

Current Agency Views Concerning Revisions to Part 1907

To stimulate public comment in response to this ANPR, OSHA's preliminary views concerning revisions to Part 1907 are set forth below.

As indicated by the title to Part 1907, its orientation is toward "accreditation of testing laboratories." It is questionable, however, whether that orientation is an appropriate one. Much of the activity involved in the testing and approval of equipment referred to in OSHA standards is more complicated than merely conducting tests in a laboratory setting. Rather, the process seems to involve "third party certification programs," as this activity has come to be known. This requires action by a "third party," *i.e.*, an entity that is neither the vendor nor buyer, to carry out such activities as determination of appropriate testing procedures and methods, evaluation of whether the product as used in the workplace conforms to the testing criteria, and assurance to employers and OSHA that the product meets the agency's standards.

Although portions of Part 1907 indicate that the regulation was aimed at evaluating a more complicated activity than merely testing in a laboratory setting (*e.g.*, 29 CFR 1907.12 (d) and (e)(3)), the accreditation system was not designed with the present concept of third party certification in mind. Nor could the regulation, promulgated 9 years ago, take advantage of recent developments in third party certification programs. Therefore, this rulemaking gives OSHA an opportunity to conduct a major overhaul of the current regulation, adopting a substantially different focus and approach. The revised rule would explicitly relate OSHA's recognition system to third party certification

programs, not laboratory testing activities.

In addition, the rule would be drafted with an eye toward the work of public and private entities that have given considerable attention to product evaluation activities. Such entities include: (1) the American National Standards Institute (ANSI) Certification Committee, which proposes to accredit third party certifiers; (2) the ANSI Committee Z34, under the secretariat of the American Council of Independent Laboratories, which has recently promulgated its Standard for Third Party Certification, Z34.1–1982; (3) the U.S. Department of Housing and Urban Development, which, under 24 CFR 200.935, allows organizations acceptable to HUD to validate manufacturers' certifications that building products and materials meet applicable standards; (4) the U.S. Commerce Department's National Bureau of Standards, which through its National Voluntary Laboratory Accreditation Program ("NVLAP") accredits laboratories based upon their ability to perform certain established tests on specified products; (5) the American Society for Testing and Materials, which has expressed a strong interest in systematizing laboratory accreditation; (6) the American Association for Laboratory Accreditation, which proposes to accredit laboratories, by specific technical disciplines, for product testing within each discipline; and (7) the U.S. Coast Guard, which approves laboratories as competent to test and certify manufacturers' products used in ships.

OSHA anticipates that it will integrate into its regulation some degree of reliance on activities conducted by groups such as these. Indeed, a positive evaluation of an applicant by one of these accrediting groups could possibly be substituted—as appropriate and to the extent warranted—for many of the more generic requirements now in Part 1907.

It is expected that after a certifier has met the requirements for OSHA recognition under Part 1907, provision would be made for public review of and comment on the application before the agency would issue its decision.

It may also be desirable to include in the revision of Part 1907 appendices concerning (a) equipment, materials, and installations requiring certification, (b) test standards required for use in testing and certification, and (c) third-party certification programs recognized by OSHA. In addition, the rulemaking could include development of guidelines for third party certifiers to use in [illegible] laboratories.

Alternatively, OSHA may wish to limit such testing activity only to laboratories accredited through a pertinent accreditation program, such as the National Bureau of Standards' NVLAP.

Under the contemplated revision, specific product-related requirements would not be contained in Part 1907 itself. Such requirements would continue to be set out in applicable standards, such as those in Part 1910. No new product approval requirements would be proposed in this revision. Existing Part 1910 standards that now require approval of products or processes would be amended to reflect the new direction taken by the revised Part 1907. Substitute language for such a standard could read, for example:

To be acceptable, type "w" equipment shall conform to ANSI standard W37–1982 and shall be certified as in conformance by a third party certifier recognized under 29 CFR Part 1907.

Through its revised recognition process, OSHA would not be attempting to control or systematize this Nation's product evaluation industry under the guise of creating an "OSHA accreditation" system. The agency intends to maintain its involvement with certifiers and testing laboratories only to the extent necessary to fulfill its legislated mandate—providing for improved safety and health conditions in the Nation's workplaces through standards-setting and related enforcement and assistance activities.

Updated Economic Information Also Requested

In addition to the technical information requested above, OSHA requests that interested parties provide certain economic information. OSHA's need for this information is based upon Executive Order 12291 and the Regulatory Flexibility Act, which require that OSHA perform an Economic Impact Assessment and a Regulatory Flexibility Analysis for every regulatory change. In order to perform these tasks, OSHA requests that interested parties provide the following information:

1. What are the typical laboratory charges for testing a firm's products? Is this a major cost in the product's development. What are the typical laboratory charges for periodic retesting?

2. How much time typically elapses between the time a manufacturer or vendor requests that a product be tested and the time the product is approved? Is there significant variation among types of products?

3. How many OSHA-related products are tested and approved (or certified) yearly? How many of these are new certifications? How many are recertifications? What are the most recent valid data available?

4. What would be the cost to testing laboratories of applying to OSHA for approval under the criteria in the current Part 1907? Which provisions, if any, in the current Part 1907 would be considered particularly burdensome economically?

5. How many persons are employed in independent testing laboratories which provide product testing and approval and presumably would be affected by this regulation?

6. What is the typical revenue annually of an independent testing laboratory? Would anticipated OSHA-related revenues be a significant addition?

7. How much OSHA-related business would independent testing laboratories anticipate receiving if the current Part 1907 is implemented? How much would be received if OSHA were to shift to third-party certification systems?

8. What would be the costs to third-party certifiers of establishing a methodology to determine whether a testing laboratory should be allowed to test a product? How long would this development take and what procedures would third-party certifiers use to evaluate these laboratories? If such procedures are in place now, what would their application costs be, in their entirety and to laboratories only?

9. What would third-party certifiers expect to charge a testing laboratory for evaluation and acceptance? Would the cost vary by size of laboratory? Would it vary by product class or discipline evaluated?

10. Are additional tests of products required in present Part 1910 that are not required for consumer product safety, state and local building, public safety, and other code requirements? What do these additional tests cost?

11. What burdens do the many different state and local requirements impose on testing agencies and certifying bodies? For economic burdens, what is the yearly cost?

Written Comments and Information

The written comments and information requested in this notice should be postmarked by February 15, 1983, and submitted in quadruplicate to the Docket Officer, Docket No. S–133, Room S–4212, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

All information submitted will be considered by OSHA in development of

proposed revisions to Parts 1907 and 1910. In addition these submissions will be available for inspection and copying during normal business hours at the OSHA Docket Office.

Authority

This document was prepared under the direction of Thorne G. Auchter, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. (Secs. 6 and 8, 84 Stat. 1593, 1600 (29 U.S.C. 655, 657); Sec. 107, 83 Stat. 96 (40 U.S.C. 333); 5 U.S.C. 553; 29 CFR Part 1911; Secretary of Labor's Order No. 8-76 (41 FR 25059)).

List of Subjects in 29 CFR Part 1907

Laboratories, Occupational Safety and Health, Research, Safety.

Signed at Washington, D.C. this 29th day of December, 1982.

Thorne G. Auchter

Assistant Secretary of Labor.

[FR Doc. 83-7 Filed 1-3-83; 8:45 am]

BILLING CODE 4510-26-M

Mine Safety and Health Administration

30 CFR Parts 55, 56, 57, 75 and 77

Wire Rope Standards; Extension of Comment Period

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice to extend period for public comment.

SUMMARY: The Mine Safety and Health Administration (MSHA) is extending the period for public comment on its proposed rule for the use of wire rope at coal and metal and nonmetal mines. The proposed rule would apply to wire ropes used to hoist personnel or to handle loads in shafts where people may be endangered by the load lifted. The comment period is extended to February 18, 1983.

DATES: Written comments must be received on or before February 18, 1983.

ADDRESS: All comments should be sent to: Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Acting Director, Office of Standards, Regulations and Variances, MSHA, (703) 235-1910.

SUPPLEMENTARY INFORMATION: On November 16, 1982 (47 FR 51064), MSHA published a proposed rule to update and clarify existing safety standards for the selection, use, examination and retirement of wire ropes. The standard would address the use of wire ropes to hoist personnel or to handle loads in shafts where people may be endangered by the load lifted.

The Agency established January 17, 1983, as the date for submission of written comments on the proposed rule. However, due to requests from several interested parties, MSHA has decided to extend the comment period to February 18, 1983. All members of the mining community who would be affected by the proposed rule are encouraged to submit comments within this time.

MSHA wishes to clarify that it does not intend to apply the proposed standards to draglines; elevators equipped with a governor rope; or cranes used to lift materials, other than cranes used in shaft and slope sinking operations where people work below the loads lifted. The Agency is aware that some mine operators use cranes to hoist personnel in applications other than shaft and slope sinking. MSHA specifically requests further comment from both manufacturers and users on the appropriateness of the proposed standards to wire rope used on cranes to hoist people.

The Agency has received a request for public hearings in this rulemaking and will publish a notice of public hearings in the Federal Register at the close of the comment period. The notice will include a schedule of hearings and list the major issues addressed by written comments.

Dated: December 28, 1982.

Thomas J. Shepich,

Deputy Assistant Secretary for Mine Safety and Health.

[FR Doc. 83-31 Filed 1-3-83; 8:45 am]

BILLING CODE 4510-43-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 903

Surface Mining and Reclamation Operation Under a Federal Program for Arizona

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Cancellation of promulgation process for a Federal program.

SUMMARY: The Office of Surface Mining (OSM) is announcing the withdrawal of the proposed Federal program to regulate surface coal mining and reclamation operations for Arizona because there are no known coal deposits on non-Indian lands in that State.

DATES: None.

FOR FURTHER INFORMATION CONTACT: James M. Kress, Branch of Regulatory Programs, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue, N.W., Washington, D.C. 20240. Telephone: (202) 343-5606.

SUPPLEMENTARY INFORMATION: On October 6, 1982, the Office of Surface Mining proposed a Federal program for the State of Arizona in the Federal Register which would regulate coal exploration and surface coal mining and reclamation operations on non-Federal and non-Indian lands in that State. 47 FR 44194. The notice provided for a public comment period and a hearing in order to receive comments but further stated that if no person indicated an intention to testify by December 3, 1982, the hearing would be cancelled. As of close of business on December 3, 1982, no persons had contacted OSM indicating that they wished to testify and, therefore, the Director of OSM cancelled the hearing.

During the comment period OSM was informed by Arizona officials that all known coal reserves in Arizona are located on Indian reservation lands. The Surface Mining Control and Reclamation Act in Sections 503 and 504, 30 U.S.C. 1253 and 1254, and OSM's regulations, 30 CFR 736.11, require that there be an approved State or Federal regulatory program in States having coal on non-Federal or non-Indian lands and in which there is a likelihood of either exploration or development before June 1985. Since Arizona does not have any known coal deposits on either non-Federal or non-Indian lands, a regulatory program is not required. Therefore, promulgation of the proposed regulatory program for Arizona is being withdrawn. Should information come to light which indicates the presence of coal on non-Federal, non-Indian lands within the State, promulgation of the required program will be reinitiated by subsequent rulemaking notice.

Dated: December 27, 1982.

William B. Schmidt,

Assistant Director, Program Operations and Inspection, Office of Surface Mining.

[FR Doc. 83-137 Filed 1-3-83; 8:45 am]

BILLING CODE 4310-05-M

federal register

TUESDAY, SEPTEMBER 11, 1973
WASHINGTON, D.C.
Volume 38 ■ Number 175

PART III

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

■

ACCREDITATION OF TESTING LABORATORIES

Criteria and Procedures

No. 175—Pt. III——1

Title 29—Labor

CHAPTER XVII—OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF LABOR

PART 1907—ACCREDITATION OF TESTING LABORATORIES

Criteria and Procedure for Accrediting Testing Laboratories

Many of the occupational safety and health standards adopted, directly or through incorporation by reference, under the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1590 (29 U.S.C. 651)) or under the Contract Work Hours and Safety Standards Act (83 Stat. 96 (29 U.S.C. 333)) require that specified equipment, or installations, or products, be approved. The term "approved" is commonly defined in the standards by reference to some action of a nationally recognized testing laboratory or agency. For instance, 29 CFR 1910.398(d) provides that "An installation or equipment is acceptable to the Assistant Secretary of Labor and approved within the meaning of this Subpart S: (1) If it is accepted or certified, or listed, or labeled or otherwise determined to be safe by a nationally recognized testing laboratory, such as, but not limited to, Underwriters' Laboratories, Inc. and Factory Mutual Engineering Corp.; * * *" Again, 29 CFR 1926.32(e) defines "approved" as sanctioned, endorsed, accredited, certified, or accepted as satisfactory by a duly constituted and nationally recognized authority or agency."

Numerous questions have arisen with regard to these definitions. In brief, it appears that the services of some testing laboratories are refused for fear that the laboratories are not "nationally recognized." In addition, some employers are uncertain as to what is sanctioned or accredited or accepted by a "nationally recognized authority or agency."

The purpose of the accreditation regulation set out below is to remove the uncertainty, and to facilitate the enforcement of occupational safety and health standards requiring approval by providing an official register of testing laboratories accredited by the Department of Labor. Any equipment, or product, or installation tested, or listed, or certified, or labeled, or accepted, or otherwise determined to be safe by such an accredited laboratory would be deemed "approved," for purposes of the relevant definition.

Laboratories which desire to be accredited to test the equipment, installation, or products required to be approved by 29 CFR Part 1910, or 29 CFR Part 1926, are invited to apply after October 11, 1973.

Because of the need to give prompt relief to the testing laboratories whose services are being refused, and to facilitate compliance with occupational safety and health standards requiring "approval," the notice of proposed rulemaking and the public participation therein, otherwise required by 5 U.S.C. 553, are impracticable and contrary to the public interest, and good cause is found for adopting the new Part 1907 immediately. However, interested persons are invited to submit in writing, data, views, and arguments concerning the regulation to the Office of Standards, U.S. Department of Labor, Railway Labor Building, 400 First Street, NW., Washington, D.C. 20010, by October 31, 1973. The regulation will be reviewed in the light of any submissions received, and will be changed appropriately if the submissions should warrant it.

Accordingly, pursuant to section 8(g)(2) of the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1600 (29 U.S.C. 657)), section 107 of the Contract Work Hours and Safety Standards Act (83 Stat. 96 (29 U.S.C. 333)) and Secretary of Labor's Order No. 12-71 (36 FR 8754), Chapter XVII of Title 29 of the Code of Federal Regulations is amended by adding a new Part 1907, reading as follows:

Subpart A—General

Sec.
1907.1 Purpose and scope.
1907.2 Definitions.

Subpart B—Accreditation

1907.10 Accreditation.
1907.11 Criteria of accreditation.
1907.12 Conditions of accreditation.

Subpart C—Procedures for Granting, Reviewing, Modifying, or Terminating Accreditation

1907.20 Granting of accreditation.
1907.30 Renewal of accreditation.
1907.35 Modification of accreditation.
1907.40 Revocation of accreditation.

AUTHORITY: Sec. 8, Pub. L. 91-596, 84 Stat. 1600 (29 U.S.C. 657); sec. 107, Pub. L. 91-54, 83 Stat. 96 (40 U.S.C. 333); Secretary of Labor's Order No. 12-71, 36 FR 8754.

Subpart A—General

§ 1907.1 Purpose and scope.

(a) This part prescribes criteria and procedures for the accreditation of laboratories which test for safety specified products, devices, systems, materials, or installations.

(b) Any product, device, system, material, or installation which is accepted, or classified, or certified, or listed, or labeled, or otherwise determined to be safe by a testing laboratory at a time when it is duly accredited shall be deemed "approved" for the purpose of the relevant definitions in Parts 1910 and 1926 of this chapter.

§ 1907.2 Definitions.

(a) For purposes of this part, unless the context clearly requires otherwise:

(1) "Accepted" means inspected and found by an accredited testing laboratory to conform to applicable test standards;

(2) "Accredited" means accredited by the Occupational Safety and Health Administration, Department of Labor, in accordance with this part;

(3) "Accreditation" means a written recognition that a named testing laboratory complies with the criteria specified in this part;

(4) "Certified" means that a product (i) either has been tested and found by an accredited testing laboratory to conform to applicable test standards, or to be safe for use in a specified manner, or (ii) is of a kind items of which are periodically inspected by an accredited testing laboratory, and (iii) in either case, bears a label, tag, or other record of certification;

(5) "Classified" means that a product has been tested, evaluated, and classified by an accredited testing laboratory with respect to a specific hazard, or limitation or condition of performance, and has affixed to it a controlled label, authorized by the laboratory, which indicates the nature of the coverage;

(6) "Labeled" means that a product has affixed to it a controlled label, symbol, or other certification mark of an accredited testing laboratory which makes periodic inspection of the production of the product and whose labeling indicates compliance with applicable test standards or tests to determine safe use in a specified manner;

(7) "Listed" means that a product is of a kind named in a list which (i) is published by an accredited testing laboratory which makes periodic inspections of the production of that kind of product, and (ii) states that samples of such products have been tested and found to conform to applicable test standards, and found to be safe for use in a specified manner;

(8) "Manufacturer" includes the person or organization that assembles or otherwise fabricates a product, and any other person or organization authorized to attach to a product his or its name, in lieu of a manufacturer's name or identifying mark;

(9) "OSHA" means Occupational Safety and Health Administration, U.S. Department of Labor;

(10) "Product" includes materials, devices, equipment, systems, installations, as well as completely assembled products;

(11) "To test" means to employ any means to determine compliance of a product with applicable test standards;

(12) "Test method" means the technical procedures and activities required in testing;

(13) "Test procedure" means a document which details the implementation of a test method; and

(14) "Test standard" means a document which specifies the performance and safety requirements for a product. Such requirements are utilized in the preparation of test procedures for testing a product. Some test standards prescribe test procedures.

Subpart B—Accreditation

§ 1907.10 Accreditation.

OSHA shall accredit any laboratory which demonstrates that it satisfies all of the requirements of §1907.11.

§ 1907.11 Criteria of accreditation.

In order to be accredited, a testing laboratory must meet all the following conditions:

(a) *General.*—(1) The laboratory maintains good housekeeping practices.

These practices are evident in office areas, test areas both inside and outside storage areas, and shipping and receiving areas.

(2) The laboratory maintains a current organization chart of the company, showing key personnel and the relationship between administration, operation, and quality control.

(3) The quality control structure and responsibilities of key personnel of the laboratory are described in a quality control manual(s). The manual is kept up-to-date and the procedures and requirements stated therein are complied with. The quality control manual(s) includes information with regard to receiving, handling, and shipping of products, testing procedures, calibration program, test reports, certifications, records and files, subcontracts, and the test standards files relating to areas of accreditation.

(h) *Master file.*—The laboratory maintains a master file containing all of the relevant primary OSHA standards and test standards applicable to the category of products for which the accreditation is sought. It contains information which provides a historical record of changes to these standards. A procedure is maintained to control the use of the master file and to insure that it is kept up-to-date.

(c) *Receiving, handling and shipping controls.*—Controls for receiving, handling, and shipping are in effect, and include procedures for:

(1) Visual examination of samples (upon receipt) for evidence of shipping damage;

(2) Periodic review of handling capabilities and maintenance of equipment;

(3) Storage of items while awaiting disposition with regard to the safety of personnel and degree of protection to preclude the possibility of damage; and

(4) Shipping and receiving data containing the date of receipt, name of manufacturer, and other necessary data to accurately record and positively identify samples as received at the laboratory.

(d) *Test procedures.*—(1) For each specified product to be tested, the laboratory uses written test procedures. These test procedures will be made available upon request to the Division of Safety Standards for examination and will serve as part of the laboratory evaluation by OSHA. The procedures shall be based on pertinent test standards such as those of American National Standards Institute (ANSI), National Fire Protection Association (NFPA), American Society for Testing and Materials (ASTM), Factory Mutual Research Corporation (FMRC) or Underwriters' Laboratories, Inc., and the specific test standard shall be identified in the application form for accreditation. Where no safety test standard exists, the laboratory shall prepare and submit both a written test standard and test procedure to the Division of Safety Standards for approval.

(2) Each test procedure includes the following information, when applicable:

(i) Nomenclature and identification of the test product;

(ii) Characteristics and design criteria to be inspected or tested, including values for acceptance or rejection;

(iii) Detailed steps and operations to be taken in sequence, including verifications to be made before proceeding;

(iv) A list of measuring equipment to be used, specifying range, type, accuracy, and test in which to be used.

(v) Layout and interconnection of test equipment and test items;

(vi) Hazardous situations or operations;

(vii) Precautions to comply with established laboratory safety requirements to ensure safety of personnel, and to prevent damage to test items and measuring equipment;

(viii) Environments and other conditions to be maintained, including tolerances;

(ix) Special instructions for inspection or testing (e.g. special handling of fragile test items);

(x) Special instructions for nonconformances, anomalous occurrences or results; and

(xi) Nomenclature and designation of applicable test standard on which the test procedure is based (for example; ANSI–A92.9–1969 or U.L. 498).

(e) *Data sheet.*—The laboratory maintains data sheets and test equipment lists for all inspections and tests performed, which are appropriate for the type and scope of inspection or test operation performed and sufficient in detail to provide for complete verification and evaluation of the operations and objectives. Data sheets include the following minimum information:

(1) Date of test, name of test and supervising engineer, nomenclature of test item and name of manufacturer;

(2) Unusual occurrences and results of each phase of testing thoroughly explained; and

(3) Signature of technician performing test.

(f) *Test equipment lists.*—A test equipment list is provided prior to the equipment utilized for that test. It includes the following information:

(1) The type and manufacturer of the equipment;

(2) The serial and/or model number of the equipment; and

(3) Date of last calibration.

(g) *Calibration program.*—The laboratory has established and utilizes a documented calibration program to assure the required degree of accuracy in measurements.

(1) The accuracy of all measurement instrument standards are traceable to primary standards maintained by the National Bureau of Standards of the United States of America or the national physical laboratory maintaining such standards in the country in which the laboratory is located. This traceability may be maintained through appropriate reference standards whose accuracy and stability have been certified by such agencies.

(2) The normal accuracy of the reference standard is at least four times as great as that of the instrument being calibrated. All equipment and reference standards are calibrated at least once a year, or in accordance with the instrument manufacturers' recommended schedules or the recommendations of the National Bureau of Standards.

(3) Documented evidence of calibrated standards and test equipment is maintained by the laboratory.

(i) If the laboratory utilizes an outside facility for calibration services, then the laboratory is responsible for the adequacy and quality of that service.

(ii) The laboratory maintains certifications with copies of calibration data and equipment lists.

(4) If equipment calibrations are performed in-house, the laboratory maintains written calibration procedures, and equipment folders containing routine maintenance information, values recorded during calibration, and standards equipment utilized for the calibration.

(5) Environmental factors critical to the calibration method are controlled during calibration processes and depend upon the physical property and degree of sensitivity of the instrument involved. The environmental factors may include temperature, humidity, cleanliness, vibration, voltage, radio frequency interference, and pressure. The requirement for these controlled environments are stated in each calibration procedure.

(6) The calibration program also contains written requirements and controls for permissible error limits, labeling and tagging of calibrated equipment, and state of the art measurements.

(h) *Laboratory organization, independence and competence.*—(1) The laboratory is legally constituted to perform testing and is independent of manufacturers and vendors in that:

(i) It has no managerial affiliation with producers, suppliers, or vendors;

(ii) It has a sufficient breadth of interest or activity, so that the loss or award of a specific contract to determine compliance of a product with the applicable test standard would not be a substantial factor in the financial well-being of the laboratory;

(iii) The employment security status of the personnel of the laboratory is free of influence or control of manufacturers, suppliers, and vendors; and

(iv) The laboratory is not engaged in promotion of the product.

(2) The laboratory can demonstrate to the OSHA representatives a level of competence and experience in the area of testing for which it is seeking accreditation or in a comparable test area, in the following manner:

(i) The technical director or the equivalent personnel of the laboratory, in conjunction with other personnel, is capable of orally presenting the laboratory's capabilities, and has a working knowledge of the applicable test standards and methods for approval of items for which the laboratory is seeking accreditation;

(ii) The laboratory can demonstrate that it is a working laboratory which has performed testing in the field of endeavor or in a comparable field of testing for which it is seeking accreditation; and

(iii) The laboratory is prepared to submit a minimum of three customer references and three test reports.

(2) The laboratory has an acceptable degree of financial security. This may be shown by means of a copy of its most recently audited financial statement, and a list of bank and credit references.

(4) The laboratory has the necessary test and inspection equipment to test the products for which it is seeking accreditation. If the laboratory utilizes a manufacturer's in-house laboratory or subcontracts for certain tests, it assumes the responsibility for the results of all testing.

(5) The laboratory maintains an adequate followup inspection system which includes means of inspecting and/or testing an appropriate sampling of a manufacturer's production at appropriate intervals (based on volume, complexity of manufacturing process, intended use, extent of field complaints, etc.) by factory inspections, field surveys, and other forms of audit procedures.

(i) *Facilities and equipment.*—The laboratory has available all facilities and test equipment relevant to the product for which accreditation is being requested. Such equipment and facilities are capable of uniformly producing and controlling all the test conditions specified in the applicable test standards. A list of such facilities and equipment is made available to the OSHA survey team, prior to the inspection of such facilities and equipment.

(j) *Personnel.*—(1) The laboratory is under the technical direction of a graduate, registered professional engineer or scientist, and is staffed by an adequate number of personnel qualified by training and experience to conduct tests and analyze data to assure the accuracy, performance, and timeliness of testing and followup inspections. The personnel has a working knowledge of the applicable test standards and test methods.

(2) There is a technical or scientific director (chief engineer) who is responsible for program schedules, manpower control and overall supervision of all test functions and personnel and who has at least a Bachelor of Science or equivalent college degree, and five (5) years of experience in fields which he directs, and is a registered professional engineer or scientist.

(3) There is a technical or scientific supervisor (department manager) who is responsible for the supervision and performance of engineers and technicians within a group, and the supervisory control of planning and testing within that group, and who has at least a Bachelor of Science or equivalent technical college degree, and two (2) years of experience in his field of responsibility.

(4) There is an engineering or scientific employee, who is responsible for the technical adequacy and quality of testing performed either by himself or under his supervision, and of the performance of technicians assigned to him, and who has at least a Bachelor of Science degree or equivalent technical college degree, and on-the-job-training.

(5) There is a technical staff responsible for tasks assigned in the performance of test functions and/or for assistance to the engineering or scientific employee, who have at least a high school diploma or equivalent and on-the-job training or trade school training.

§ 1907.12 Conditions of accreditation.

The following conditions shall be part of every accreditation:

(a) *Evidence of accreditation.*—The accreditation of any testing laboratory shall be evidenced by a letter of accreditation from OSHA.

(b) *Period of accreditation.*—The accreditation of a testing laboratory shall be valid for a period of two years, unless terminated before or renewed after the expiration of the period. The period of validity shall be stated in the letter of accreditation.

(c) *Maintenance of qualifying conditions.*—Every accredited testing laboratory shall continue to satisfy all the conditions specified in § 1907.11 during the period of the accreditation.

(d) *OSHA identification.*—(1) The accredited laboratory shall require its OSHA identification to appear on every product which it has found to comply with the appropriate test standards. The OSHA identification shall be assigned by OSHA and shall include the laboratory's own distinctive label or trademark. It:

(i) Shall be coded or otherwise designed as to aid in detection of counterfeiting or other forms of misuse;

(ii) Shall not be readily transferable from one product to another;

(iii) Shall be directly applied to each unit of production in the form of labels or markings suitable for the environment and use of the product. If the physical size of a unit does not permit direct application, such a label or marking may be attached to the smallest package in which the unit is marketed;

(iv) Shall include either the proprietary name, certification mark, or registered trademark of the laboratory; and

(v) Shall include the name of the product classification, where this is not completely obvious.

(2) Determination of noncompliance or revocation of authority to use the OSHA identification mark for a product shall be the responsibility of the accredited laboratory. Such actions shall not prejudice resubmission of the product after deficiencies have been corrected. If the manufacturer defaults in its obligations with respect to its approved products, the laboratory may, at its discretion, terminate its approval by written notice to the manufacturer and to OSHA.

(3) The laboratory shall establish and implement appropriate procedures to prevent the misuse of its OSHA identification mark, including procedures for:

(i) Removal of the OSHA identification mark from a product found at the factory not to comply;

(ii) Recall of nonconforming products, with notice of the recall to OSHA, the manufacturer of the affected product, and the public; and

(iii) Return of separable OSHA identification marks or labels, and confirmation of obliteration or destruction of other means of directly applying the identification mark, when approval of a product is withdrawn or discontinued.

(e) *Product acceptance.*—(1) A test report shall be made to OSHA by the accredited laboratory for each submission of a product that has been tested and found to comply with applicable test standards. The test report shall be signed by an authorized representative of the laboratory, who is technically competent, responsible for the quality and accuracy of the work, and whose credentials have been previously presented to OSHA.

(i) A copy of the report shall also be forwarded to the manufacturer to serve as notification that the product complies with the applicable test standards.

(ii) The laboratory shall retain a copy of the report on file with the data accumulated during the actual testing for at least five (5) years.

(iii) The test report shall:

(A) Specify the catalog or model numbers covered by the test investigation;

(B) Specify the differences in various models;

(C) Report the results of all tests performed;

(D) Incorporate a signed statement that the product covered by the test Report complies with the applicable test standards; and

(E) Include a copy of the test procedure.

(2) A list of all products which have been approved by an accredited laboratory shall be published by that laboratory, and a copy forwarded to OSHA, on at least a quarterly basis, and shall be consolidated on an annual basis.

(3) The laboratory shall perform followup testing or inspection of the production of products which it has approved. Contractual arrangements regarding these services shall be between the laboratory and the manufacturer and shall limit the application of the OSHA identification mark only to those products which are in compliance with the applicable test standards. As part of the followup procedures, the laboratory shall:

(i) Conduct market surveys to counterbalance approved products;

(ii) Investigate alleged field failures of approved products to assess adequacy of safety test standards, acceptance testing, and continuing product compliance;

(iii) Select and evaluate production samples of the products to confirm validity of prototype testing before issuance of approval notice;

(iv) Conduct a production compliance inspection of products of a manufacturer being approved for the first time, before authorizing release of products bearing the OSHA identification mark; and

(v) File a followup report to OSHA. Such a report shall be deemed a test report within the meaning of paragraph (a) (1) of this section.

(4) Authorization to apply the OSHA identification mark to approved products shall be the function of the accredited laboratory. Testing of the product, inspection at place of manufacture, observation of, or participation in, in-house testing, consulting, and any other procedures necessary shall be employed by the accredited laboratory to assure that the products comply with appropriate test standards.

(f) *Recordkeeping.*—(1) The accredited laboratory shall maintain the following records:

(i) Test reports on all products tested;

(ii) All data generated during testing;

(iii) Records supporting compliance with calibration program;

(iv) Equipment lists;

(v) Receiving and shipping records;

(vi) OSHA accreditation correspondence (application, letter of accreditation, etc.);

(vii) Organization chart and personnel files, including list of all personnel job responsibility description and job training program;

(viii) Financial records;

(ix) Quality control manual(s); and

(x) A master file containing all the OSHA regulations and standards referenced therein which are applicable to the product for which accreditation has been granted.

(2) The minimum period of retention for the records shall be five (5) years, except that shipping and receiving records need be kept only for a minimum of one (1) year.

(g) *Reports.*—(1) The accredited laboratory shall furnish OSHA an annual report detailing the extend of its activities for the year, and covering the products which it has approved during the year. The report shall include information concerning:

(i) The number of factory inspections;

(ii) Field surveys;

(iii) Laboratory check tests;

(iv) Extent of examination or testing of products;

(v) Calibration program;

(vi) List of approved products;

(vii) List of recalled products; and

(viii) Extent of audit of manufacturer's quality control procedures.

(2) The accredited laboratory shall also furnish OSHA a quarterly report which shall include the following:

(i) List of approved products.

(ii) List of recalled products.

(h) *Inspection of laboratories.*—(1) The accredited testing laboratory shall grant OSHA the right to conduct unscheduled inspections of the laboratory in order to assure continued compliance with the requirements for accreditation, and shall cooperate in the conduct of the inspections.

(2) The laboratory upon request by OSHA shall verify, at its expense, any data which it has generated.

(3) In order to compare and verify various testing techniques and interpretation of requirements, an accredited laboratory shall, at its own expense, participate in periodic reference sample test programs under the direction of OSHA.

(i) *Other conditions.*—The accredited testing laboratory shall comply with any other term or condition stated in its letter of accreditation.

Subpart C—Procedures for Granting, Renewing, Modifying, or Terminating Accreditations

§ 1907.20 Granting of accreditation.

(a) *Application.*—Any testing laboratory seeking accreditation may file an application therefor with the Division of Safety Standards, Office of Standards, OSHA, U.S. Department of Labor, Railway Labor Building, 400 First Street NW., Washington, D.C. 20001. The application for accreditation must be made on appropriate forms available at the Division of Safety Standards.

(b) *Action on applications.*—(1) *Defective applications.*—If an application for accreditation does not contain sufficient information with regard to all the criteria of accreditation the Division of Safety Standards may deny the application. Notice of a denial shall be given to the applicant and shall state all the deficiencies of the application. A denial of an application shall be without prejudice to the submission of a new or amended application.

(2) *Adequate applications.*—If an application is not denied pursuant to paragraph (b) (1) of this section the Division shall acknowledge the receipt of the application and shall make arrangements for an onsite survey of the applicant's laboratory facilities at a mutually agreeable time.

(3) *Onsite survey.*—The Division of Safety Standards shall perform an onsite survey of the applicant's laboratory facilities for the purpose of verifying the representations of the application concerning the criteria of accreditation. The Division shall make a complete written report of the survey and shall maintain it in an appropriate file containing the application, the report and any other writing concerning the application.

(4) *Decision.*—(i) If the Division of Safety Standards is persuaded that the applicant satisfies all the criteria of accreditation it shall send to the applicant a letter of accreditation. The applicant shall keep the letter with the other records required by § 1907.12(f).

(ii) If the Division is not persuaded that the applicant satisfies all the criteria of accreditation it shall give the applicant written notice of a proposal to deny the application. The notice shall contain a statement of all the reasons for the proposed denial and shall notify the applicant that:

(A) The proposal to deny the application is based on the information in the relative application file;

(B) All the papers in the file are available to the applicant for inspection and copying;

(C) The applicant may contest the Division's reasons for the proposed denial by giving to the Division prompt notice of its contentions;

(D) The applicant may request an opportunity to submit oral or written evidence in support of its contentions, and also to conduct such cross-examination as may be necessary for a full and true disclosure of the relevant facts; and that

(E) The application will be deemed denied, on a stated date, unless, prior to that date, the Division receives a notice of contest.

(iii) If a proposal to deny an application is contested, the Division shall make the arrangements necessary to disclose to the applicant all the facts and arguments on which the proposed denial of the application is based and to afford the applicant a full opportunity to refute those facts and arguments and to present evidence in support of its own contentions. To the maximum extent consistent with fairness the disclosures by the Division and the refutations and presentations of a contesting applicant shall be in written form and shall be made part of the application file. Any oral examination and cross-examination shall be recorded and made part of the application file.

(iv) The Division shall make a decision on the application and give notice of it to the applicant. The decision shall include a statement of findings and conclusions and the basis therefor on all the material issues presented. Findings and conclusions on issues of fact must be based solely on the evidence in the application file.

(5) *Review.*—An applicant aggrieved by a decision of the Division of Safety Standards may obtain review of the decision by filing a written application for review with the Administrator of OSHA within 20 days of receipt of the notice of the decision. The review shall be on the basis of the application file. The Administrator may affirm, modify, or reverse the decision of the Division or remand it to the Division for further proceedings.

§ 1907.30 Renewal of accreditation.

(a) *Applications.*—An accredited testing laboratory may renew its accreditation by filing with the Division of Safety Standards a completed renewal form, not less than 30, nor more than 60, days before the expiration date of its current accreditation.

(b) *Effect of application.*—When an accredited testing laboratory has filed a timely and sufficient renewal form, its current accreditation does not expire until the renewal application has been finally determined.

(c) *Action on applications.*—An application for renewal of accreditation may be granted only if the Division of Safety Standards is persuaded that the applicant continues to satisfy all the criteria of accreditation set forth in § 1907.11. As far as practicable, an application for

renewal of accreditation shall be processed in accordance with § 1907.20 except that the Division may waive its right to conduct an onsite survey.

§ 1907.35 Modification of accreditation.

(a) *Termination or limitation of accreditation.*—An accredited testing laboratory may voluntarily terminate its accreditation, either in its entirety or with respect to some of the products covered by the accreditation, by giving written notice of its intent to the Division of Safety Standards. The notice shall state the date as of which the termination is to take effect. As of the effective date of the termination, the laboratory may no longer use, nor authorize the use of, its OSHA identification labels or markings for the products involved.

(b) *Enlargement of accreditation.*—An accredited testing laboratory may apply to the Division of Safety Standards for an enlargement of its current accreditation to cover additional products. The application shall be processed and acted on in accordance with the applicable provisions of § 1907.20, except that the Division may waive the right to conduct an onsite survey.

§ 1907.40 Revocation of accreditation.

(a) *Grounds for revocation.*—The Division of Safety Standards may revoke an accreditation in case of (1) material misrepresentation in the application for the accreditation or its enlargement, or its renewal, or (2) failure to comply with a condition of the accreditation.

(b) *Procedure for revocation.*—(1) Except in cases of willfulness or those in which the safety of employees requires otherwise, no accreditation may be suspended or revoked unless before the institution of revocation proceeding the accredited laboratory has been given (i) written notice by the Division of Safety Standards of the facts or conduct which are believed to warrant the revocation or suspension, and (2) a reasonable opportunity to demonstrate or achieve compliance with the applicable requirements.

(2) The procedure for suspension or revocation of an accreditation shall conform, to the extent practicable, to the procedure for accreditation prescribed in § 1907.20(b) (4) and (5).

Effective date.—This Part 1907 shall become effective on October 11, 1973.

Signed at Washington, D.C. this 4th day of September 1973.

JOHN STEPHENS,
Assistant Secretary of Labor.

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